In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-869

KEITH ROBERTS,
Petitioner,
v.
CIVIL AERONAUTICS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals, District of Columbia Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals, District of Columbia Circuit

The petitioner, KEITH ROBERTS, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit rendered on October 16, 1975. Petitioner was Intervenor in No. 73-1772 and petitioner in No. 73-1790. A petition for rehearing with suggestion of a hearing en banc, timely filed, was denied on November 20, 1975.

OPINION BELOW

The opinion of the United States Court of Appeals of October 16, 1975, reported at 521 F.2d 298, appears at Appendix A, infra, pp. A1-A20. Said opinion affirmed in all respects a final order of respondent CIVIL AERONAUTICS BOARD, after petitioner herein filed a timely petition

for review of that order. The Order of the United States Court of Appeals denying a rehearing and a hearing en banc appears at Appendix B, infra, pp. B1 and B2.

JURISDICTION

On October 31, 1975, petitioner timely filed a petition for rehearing and suggestion for hearing en banc. The Order of the United States Court of Appeals denying the petition for rehearing and suggestion for hearing en banc was filed on November 20, 1975. See Appendix B, pp. B1 and B2, infra. This petition for certiorari was filed less than 45 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1301, et seq. *Morse v. United States* (1926) 270 U.S. 151, 70 L.Ed. 518 (timely filing of petition for rehearing suspends the running of time for taking a writ of error).

QUESTIONS PRESENTED

Petitioner Keith Roberts brought suit to recover, for the benefit of a described class, those amounts which its members were required to pay for air transportation on the basis of tariffs expressly held to be "unlawful" by the United States Court of Appeals for the District of Columbia. See *Moss et al. v. Civil Aeronautics Board*, 139 U.S. App. D.C. 150, 430 F.2d 891 (1970). The "unlawful" rates were approximately 6% higher than those prevailing prior to October 1, 1969. Said case, originally filed in a California state court, was removed to the United States District Court for the Northern District of California from which it was transferred to the United States District Court for the Northern District of Illinois, Eastern Division. See *In Re Air Fare Litigation* (JPML) 322 F.Supp. 1013 (1971) and assigned No. 71 C 783 therein.

Thereafter, the Illinois District Court granted the motion of defendant air carriers for a "stay (of all proceedings, including any class action determination) to await the findings of the C.A.B. on the question of reasonableness *vel non* of the fares charged between October 1969 and October 1970." See *Weidberg et al. v. American Airlines, Inc., et al.* (N.D. Ill.) 336 F.Supp. 407, 414 (1972). On December 10, 1973, the District Court, per Judge Hubert Will, dismissed *Roberts v. American Airlines, Inc.* (No. 74-1108) as moot. A timely notice of appeal was filed, and the appeal was argued on September 8, 1975, before the United States Court of Appeals for the Seventh Circuit.[1]

On February 25, 1971, after complying with the mandate of the Court of Appeals by establishing new, lawful rates prospective in operation [See Board Order No. 70-7-128 of July 28, 1970 (C.A. App. 4 and 5)], respondent Civil Aeronatics Board issued its Order No. 71-2-109 entitled "Order Instituting Investigation" bearing Docket No. 23140 (See C.A. App. 44-54). It was captioned "Reasonableness of passenger fares charged by Domestic Trunklines and Local Service Carriers from October 1, 1969 through October 14, 1970." On July 9, 1971, Keith Roberts applied for leave to intervene in Docket No. 23140. His application was granted on August 13, 1971, by Board Order No. 71-8-39.

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1. On December 8, 1975, the United States Court of Appeals for the Seventh Circuit affirmed as modified the judgment of dismissal in several consolidated cases, one of which was *Keith Roberts, et al. v. American Airlines, Inc., et al.* See Appendix D, infra. The Court of Appeals did so fundamentally on the ground that Petitioner Roberts and class were not entitled to restitution, because the 1969 Board Order No. 69-9-68 was voidable, not void. Petitioner submits that this is the *only* ground on which restitution could be withheld, since the Court did not address itself to the question whether the Board could retroactively extinguish a common law remedy available under Section 1106. The *void* versus *voidable* question is one fairly embraced within the issues stated in this peti-

On July 11, 1973, the Civil Aeronautics Board, by Order No. 73-7-39 terminated Docket No. 23140 and denied all requests for relief, including those made by Keith Roberts, petitioner herein, who, in the District Court, requested restitution of a portion of the "unlawful" fares as having been paid by a mistake of fact or law, or both. His petition for review pursuant to the provisions of Rule 15, Federal Rules of Appellate Procedure followed. The opinion of the United States Court of Appeals was filed on October 16, 1975. See Appendix A at pp. A.1-A.20, infra. Keith Roberts then timely filed a petition for rehearing and suggestion of hearing en banc. It was denied by order of November 20, 1975. See Appendix B at pp. B.1-B.2, infra.

In the setting above outlined, the questions presented thereby arising are:

I. Does the Federal Aviation Act, notwithstanding statutory provision preserving common law remedies, require that Civil Aeronautics Board be given opportunity to retroactively validate tariffs expressly held unlawful by the United States Court of Appeals, thereby extinguishing any private right of action for restitution of all or any part of the difference between the last lawful fares and the fares found unlawful?

II. Does the Civil Aeronautics Board have decisional authority under the Federal Aviation Act to determine that an individual or class of individuals who has sustained

tion. It is Petitioner Roberts' contention that restitution is the proper remedy without regard to the reasonableness of the "unlawful" fares. At least one measure of restitution is an amount which would not reduce the air carriers' rate of return to a confiscatory level. See *Williams v. Washington Metropolitan Transit Commission*, 134 U.S. App. D.C. 342, 415 F.2d 922 (1968) cert. denied 393 U.S. 1081, 21 L.Ed.2d 773 (1969). For a different measure see Bebchick v. Public Utilities Com'n, 15 U.S. App. D.C. 216, 318 F.2d 187, cert. denied, 373 U.S. 913, 10 L.Ed.2d 414 (1963)—establishment of a fund on the carrier's books to be applied for the benefit of future fare-paying passengers.

injury by being compelled to pay unlawful tariffs, and who would otherwise have a common law remedy for restitution, would have no such remedy should the Board retroactively determine the tariffs were just and reasonable, notwithstanding they were unlawful as being adopted in a manner not sanctioned by the Federal Aviation Act?

III. Does the Civil Aeronautics Board have the power under the Federal Aviation Act to define the common law remedy of restitution for payment of unlawful tariffs due to a mistake of law, or fact or both, in a manner which extinguishes that remedy?

IV. May tariffs expressly held unlawful by the Court of Appeals be treated as properly on file with the Civil Aeronautics Board?

V. In initiating Docket No. 23140, did the Civil Aeronautics Board act in excess of the authority granted to it by the mandate of the United States Court of Appeals in its judgment of July 9, 1970, in *Moss et al. v. Civil Aeronautics Board*, supra?

STATUTES INVOLVED

Sections 204(a), 403(b), 1002(a) and 1106 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1301, et seq., especially 49 U.S.C. 1324(a), 1373(b), 1482(a) and 1506. Pertinent portions are set forth in Appendix C.

STATEMENT

Petitioner is plaintiff in an action which seeks to recover overcharges paid to American Airlines, Inc. as the result of tariffs expressly held "unlawful" in *Moss et al. v. Civil Aeronautics Board, et al.*, supra (hereinafter Moss I). On September 20, 1969, the Civil Aeronautics Board (hereinafter Board), issued Order No. 69-9-68 suspending certain carrier proposed rates. However, in the same order, the

Board identified a formula by which the air carriers could compute rate increases that would not be suspended by it. Rate increases of approximately 6%, as contemplated by the Board formula, were filed and became effective as of October 1, 1969. Congressman Moss and approximately 24 of his colleagues petitioned for review of Board Order No. 69-9-68. On July 9, 1970, the United States Court of Appeals held that the September 12, 1969 rate order was invalid and the tariffs based thereon were "unlawful," for failure to comply with the provisions of Sections 1002(d) and (e) of the Federal Aviation Act, 49 U.S.C. 1482(d) and (e), which require notice and public hearing where the Board determines rates. See *Moss I* at p. 902 (F.2d).

The Board moved the Court of Appeals for a stay of mandate for the purpose of allowing the establishment of new, lawful rates. See page 2 of Board Order No. 70-7-128 dated July 28, 1970, in its Docket No. 21322 (C.A. App. 3)[2], and page 5 of Order No. 70-9-123 in its Docket Nos. 21322 and 21866 dated September 24, 1970 (C.A. App. 17). In its Order No. 70-9-123, the Board permitted new lawful tariffs to take effect on October 15, 1970. Thus, for the period from October 1, 1969 to October 15, 1970, the air carriers charged all those who purchased air transportation unlawful rates approximately 6% higher than those in effect prior to October 1, 1969. By his action, Keith Roberts seeks to recover for the benefit of a limited class all or a portion of the sums paid in excess of the last lawful rates. The class described in his complaint includes all those who purchased air transportation using an American Airlines, Inc. air travel card. The remedy he seeks on behalf of this class is restitution of monies paid on the basis of a mistake of fact, or law, or both.

2. "C.A. App." refers to the appendix in the Court of Appeals, a copy of which will be lodged with the Clerk.

In affirming the Board in *Moss v. Civil Aeronautics Board* (Appendix A and hereinafter *Moss II*), the Court of Appeals extinguished the common law remedy expressly reserved by Congress in the saving clause of Section 1106 in the Federal Aviation Act (49 U.S.C. 1506). Quoted below in full, Section 1106 provides:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Restitution is a common law remedy of ancient origin. However, in *Moss II*, the Court of Appeals has conditioned restitution on an erroneous requirement that "the Board pass in the first instance not only on the reasonableness of past rates, but on the equity of any recovery where such rates are found to have been unreasonable." See pages A.13-A.-14 of Appendix A.

This requirement is inconsistent with the rationale of *Hewitt-Robins Inc. v. Eastern Freightways, Inc.* (1962) 371 U.S. 84, 9 L.Ed.2d 142. There, this Court indicated a remedy for *properly* filed rates later found to be unlawful might exist. In *Hewitt-Robins,* the controversy turned entirely upon whether the carrier violated its duty to the shipper in selecting the higher interstate rate rather than the lower intrastate rate, both of which were treated as reasonable. This Court held that a remedy against the carrier for misrouting existed under the saving clause of the Motor Carrier Act, 49 U.S.C. 316(j), plainly for a violation of its duty to the shipper to use the cheapest available route. As this Court stated on page 89 U.S.:

> ". . . the survival of a judicial remedy under the saving clause . . . cannot be determined on the presence or absence in the Commission of primary jurisdiction to decide the basic question on which relief depends.

> Survival depends on the effect of the exercise of the remedy upon the statutory scheme of regulation. . . ."

In the instant case, the Board, with the collusive cooperation of the air carriers, violated its statutory duty to notice and hold a public hearing. See 49 U.S.C. 1482(d). In *Consolidated Edison Co. of N.Y. v. Federal Power Commission*, ... U.S. App. D.C. ....., 512 F.2d 1332, 1342 (1975), the Court of Appeals, referring to *Moss I* noted at page 1342 (F.2d):

> ". . . we stressed that the CAB's rate formula was the product of behind-the-scenes bartering between the agency and the carriers, and that none of the tariffs filed consistent with the CAB's formula were subject to investigation after they became effective. . . ."

In *Moss I*, the Court of Appeals concluded on page 900 (F.2d) that:

> ". . . the Board (was) only seeking to avoid the strict requirements of the rate-making portion of the statute and the resulting more stringent judicial review. *No requirement of Board operation or policy of the Act seems to support the Board's blatant attempt to subvert the statute's scheme.*" (Emphasis added.)

Moreover, the Board concededly took this action (its formula) after closed sessions with carrier representatives and without the public hearing required by statute. It would be difficult, if not impossible, to find a case where the Board's blunders can be designated as procedural error and the only factor which made the resulting tariffs "unlawful." Collusive misconduct of the air carriers taints these fares as both illegal and void. No requirement of the Federal Aviation Act ("the statutory scheme") or primary jurisdiction supports the proposition that ". . . the Board pass in the first instance . . . on the reasonableness of, past rates . . ." under these circumstances.

This is particularly pertinent here, since the Board, in its Order No. 70-7-128 of July 28, 1970 (Docket No. 21322) stated on page 1 (C.A. App. 2):

> "Finally, the lower fares established pursuant to the Board's order, *and then considered by the Board to be 'just and reasonable'* were struck down by the Court because of the manner in which they were adopted rather than because they were unjust and unreasonable, a point on which the court voiced no opinion." (Emphasis added.)

Thus, by the Board's own admission, the rates based on its own formula were just and reasonable. By necessary implication, the Board had therefore in the first instance exercised its primary jurisdiction in 1969 by advising the air carriers that it would accept formula-based rates without suspension. No court need defer to an administrative expertise already exercised. Docket No. 23140 therefore must be treated as a *second* and *post hoc* rationalization of its "unlawful" fares, not an exercise of primary jurisdiction allowing it to ". . . pass in the *first* instance . . . on the reasonableness of past rates . . . ."

Nowhere in the Federal Aviation Act, is there any statutory grant of power to the Board to initiate a hearing for the purpose of retroactively validating tariffs expressly found "unlawful."

This is particularly true where the Board itself (as noted in Moss I at page 896) in the first instance considered those tariffs as a "just and reasonable ceiling" at the time they became effective on October 1, 1969. See *Tishman & Lipp, Inc. v. Delta Air Lines, Inc.* (C.A. 2) 413 F.2d 1404 (1969) affirming the District Court (D.C. N.Y.) 275 F.Supp. 471, 476 (1967). There, the District Court held that referral of the issue of *past reasonableness* of a tariff to the Board

was impermissible. See also *Voglesang v. Delta Air Lines, Inc.* (C.A. 2) 302 F.2d 709 (1962) cert den 371 U.S. 826. In *Vogelsang,* the court declined to refer the issue of past reasonableness of a tariff to the Board. The opinion of the court indicated that the Board "may well be precluded" from ruling on the tariff retrospectively, but relied primarily on the fact that the Board had recently expressed approval of the tariffs at issue.

Consequently, it would be an unconscionable perversion of the administrative process to now allow the Board to retroactively "validate" an "unlawful" tariff considered by it to be just and reasonable in 1969, when it cannot retrospectively "invalidate" a tariff it had approved. Congress established the Board for the purpose, *inter alia,* of protecting the public interest, not flouting it at the expense of fare-paying passengers. By its unprecedented decision, the Court of Appeals has sanctioned a gross inequity and placed on fare-paying passengers, who have no independent bargaining power, the burden of showing that "unlawful" fares can somehow be converted, *ex post facto,* into fares which were not unjust or unreasonable. Nothing in the Federal Aviation Act indicates a Congressional intent to allow the Board to engage in this excursion into retroactive ratemaking.

In *Vogelsang* and *Tishman & Lipp,* both supra, the court could not have been unmindful of the Board's power to "conduct such investigations . . . as it shall deem necessary to carry out the provisions . . . of this chapter." Section 204(a), 49 U.S.C. 1324(a), and upon "complaint in writing with respect to anything done . . . in contravention of . . . this chapter, . . . to investigate the matters complained of." Section 1002(a), 49 U.S.C. 1482(a). Petitioner has been unable to find any case citing either of these sections for the proposition that ". . . the power to do so (furnish a

retrospective answer to the question of reasonableness) seems amply embraced with the Board's powers under these sections (See Appendix A at page A.12—Fn. 19—infra). The Court of Appeals itself cited no case authority for this proposition. Moreover, it conceded there was scant precedent for the granting or denial of recovery of unlawful airline fares, citing only *Danna v. Air France* (S.D. N.Y.) 334 F.Supp. 51 (1971), aff'd. (C.A. 2) 463 F.2d 407 (1972). There, recovery was sought of allegedly discriminatory fares. The District Court dismissed, and the judgment was affirmed but on the limited ground that recovery must await a determination by the Board that the fares in question were indeed unlawfully discriminatory. In the instant case *(Moss II),* the Court of Appeals had already found the fares were "unlawful". As noted above, it did so *after* the Board's exercise of primary jurisdiction in 1969. Thus, the "scant precedent" for the granting or denial of recovery of unlawful fares has no bearing on the instant case.

In fact, by enacting Section 204(a), 49 U.S.C. 1324(a), Congress gave the Board a non-specific grant of power to conduct such investigations . . . as it shall deem necessary to carry out the provisions of this chapter", clearly a power exercisable only prospectively. Moreover, as this Court has stated: ". . . the fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do, but Congress has said it can do." See *Civil Aeronautics Board v. Delta Air Lines, Inc.* (1961) 367 U.S. 316, 322, 6 L.Ed.2d 869.

In enacting Section 1002(a)—49 U.S.C. 1482(a)—Congress authorized "any person" to file a complaint "with respect to anything done or omitted to be done . . . in contravention . . . of this chapter." A complaint was filed, and, as a result, the Court of Appeals held that the Board had

violated its statutory duty under Section 1002(d) by failing to notice and hold the public hearing required therein. It seems reasonable to conclude that Section 1002(a) was and is a Congressional grant of power enabling "any person" to file a complaint, not a grant of power enabling the Board to retroactively validate rates expressly found "unlawful." In fact, the Board itself has effectively limited the reach of Section 1002(a). In its Annual Report to Congress, Fiscal Year 1969, the Board stated in part on page 55:

> "While the CAB may entertain complaints against overcharges, it is not authorized in specific terms to require payments. *Passengers desiring to collect overcharges must resort to the courts.*" (Emphasis added.)

Having granted the Board power to determine just and reasonable rates based on statutory criteria, Congress has not gone further and given the Board power to focus ". . . on the equity of restitution . . . ." That is a purely judicial function. See *Hewitt-Robins, Inc.,* supra, where this Court stated that the survival of a judicial remedy under the saving clause does not rest on the presence or absence of primary jurisdiction to decide the basic question on which relief depends. Cf. *Nader v. Allegheny Airlines, Inc.,* ..... U.S. App. D.C. ....., 512 F.2d 527 (1975), cert granted, 44 LW 3270, on November 11, 1975, (No. 75-455). There, Judge Fahy, Senior Circuit Judge (concurring in part, dissenting in part) felt that the majority opinion nullified the saving clause of the Federal Aviation Act—Section 1106.

On page 553 (F.2d), Judge Fahy stated in part:

> "Yet our court now holds, if the Board properly finds that a practice is not deceptive, a common law action for misrepresentation must fail as a matter of law.
>
> "I assume the court, by the language 'properly finds', means finds in a manner which would meet judicial approval on review of such a finding made in the exercise of the Board's power under section 411, without such power being conditioned by the common law or section 1106 of the Act. I so assume because it is clear the court now vests the Board with decisional authority to determine that an individual who has suffered injury due to a carrier's fraudulent misrepresentation, and who otherwise would have a common law remedy, would have no such remedy should the Board determine the conduct was not deceptive. This position of the court that if the Board in a section 411 proceeding determines that a practice is non-deceptive then a common law action for fraudulent misrepresentation must fail as a matter of law seems to me to nullify section 1106. Moreover, the court thus divests itself not only of the authority to adjudicate a claim of fraudulent misrepresentation but also vests the Board with authority to define fraudulent misrepresentation in a manner which the courts must accept for the airline industry. I do not find that Congress has so provided or intended. Indeed, section 1106 seems to me clearly to the contrary. Section 411 affords, or denies, only a statutory remedy, unknown to the common law."

By concluding that the Board correctly focused on the equity of restitution (Appendix A, infra, at page A.13), the Court of Appeals approved exercise of a power not entrusted to the Board by Congress. Moreover, as noted above, the Court of Appeals has divested itself not only of the authority to adjudicate a claim of restitution for money paid on the basis of a mistake of fact, or law, or both (a common law remedy), it has also vested the Board with authority to define this remedy in a manner which the courts must accept for the airline industry.

There is nothing in the Federal Aviation Act to show that Congress intended to vest the Board with clearly judicial power of this kind. The adjudication of common law remedies is a job for the courts alone, entirely independent of the Board's jurisdiction to determine just and reason-

able rates "in the first instance," not in a second proceeding where its findings are retrospective in effect.

It is no answer to assume, as the Court of Appeals did (Appendix A, infra, at page A.8) that the Board committed a merely procedural error. (See *Atlantic Coast Line v. Florida* (1935) 295 U.S. 301, 79 L.Ed. 1451 and Fn. 19 at page A.12 of Appendix A, infra.) Reliance on the purely procedural error argument in *Atlantic Coast Line* effectively denies restitution to passengers from whom "unlawful" fares were exacted. Furthermore, it does so within a legal and factual context which is not at all comparable to the instant case. In that case, recovery was sought of rate increases which the Interstate Commerce Commission had itself ordered into effect to end discrimination against interstate commerce. The Commission's order was reversed for lack of adequate factual findings. The Commission subsequently issued new and legally sufficient findings, and it was upheld in the courts. The rates changed as a result of the procedural error of the ICC alone relieved ". . . the carrier of any stigma of extortion". See page 1460, L.Ed. By applying an *exception* to the general rule—what has been lost to a litigant by a judgment must be restored, upon reversal, by the beneficiaries of the error—this Court denied restitution to the shippers of the amounts paid after the Commission was first reversed. This general rule applies to upset orders of administrative agencies. See *United Gas Improvement Co. v. Callery Properties, Inc.* (1965) 382 U.S. 223, 227; 15 L.Ed.2d 284.

In denying restitution, this Court, per Justice Cardozo, recognized that the first Commission order was *void*. On page 1458 (L.Ed.), the majority noted in part:

> "An order declaring the discrimination to be excessive and unjust was made by the Commission before the carrier attempted to collect the higher charges. Thereafter, the order was adjudged void by a decision of this

> Court . . . but void solely upon the grounds that the facts supporting the conclusion were not embodied in the findings. *Void in such a context is the equivalent of voidable.*" (Emphasis added.)

The italicized phrase clearly refers to the fact that the procedural error was solely due to Commission failure to support its findings, and the carrier was not at fault in any way. In the instant case, the "unlawful" rates were the product of collusive rate-making between the air carriers and the Board. Significantly, the dissent in *Atlantic Coast Line* stated on page 1465 (L.Ed.):

> "Fourth, the *order* of the Interstate Commerce Commission of August 2, 1928, *being null and void,* could not justify the carrier in thereafter collecting the increased rates therein named . . . . It was bound by the provisions of the Act to institute an inquiry and could enter an order only upon adequate evidence and findings which should be *prospective* in operation." (Emphasis added.)

In *Moss I,* the rate order was clearly void, though described as "invalid," and the tariffs based thereon were held "unlawful," having become effective without the required statutory notice and hearing and after gross misconduct by the air carriers acting in concert with the Board. See 49 U.S.C. 1482(d). Since the tariffs were not changed in a manner sanctioned by law, it seems clear that they cannot be treated as properly filed. Cf. *Chicago M. St. Paul & P.R. Co. v. Alouette Peat Products* (C.A. 9) 253 F.2d 449 (1957). In *Alouette,* the court noted that ". . . a rate once fixed remains established until changed *in some manner allowed by law.*" (Emphasis added.)

It is clear beyond any doubt that the rates challenged in *Moss I* were *not* changed in "a manner allowed by law." In fact they were changed through a process involving "behind-the-scenes bartering between the agency and the car-

riers." (See *Consolidated Edison Co. of N.Y.*, supra), in a "blatant attempt to subvert the statute's scheme." (See *Moss I* at page 900 (F.2d).)

These factors were certainly not present in *Atlantic Coast Line*, supra, and cannot represent the type of procedural error which impelled Justice Cardozo to find the void rates there voidable because of fault on the part of the Commission alone. To imply that restitution here is merely making the air carriers pay the price of Board blunders is pure sophistry. It would be blinking reality to treat the carriers as though they played no part in what the Court of Appeals itself described as collusive rate-making or did not profit from their own wrong. Given the blatant and collusive misconduct of the Board and the air carriers, the latter are entitled only to a rate of return which is not confiscatory. See *Federal Power Commission v. Natural Gas Pipeline Co.* (1941) 315 U.S. 575, 585-586, 86 L.Ed. 1037, 1049. (". . . zone of reasonableness . . . higher than a confiscatory rate.")

In Moss II, the Court of Appeals rejected recovery based on the last lawful rate theory (Appendix A, infra, at page A.15). However, it did so without the benefit of any determination that the last lawful rates were unjust and unreasonable, and hence confiscatory. See *Atlantic Coast Line* at page 1459 (L.Ed.). Hence, it must be assumed that those rates, never having been challenged, were just, reasonable and non-confiscatory. However, in *Atlantic Coast Line*, this Court expressly found "the inequality and injustice inherent in the Cummer rates" as being less than compensatory [See page 1459 (L.Ed.)], and denied restitution. However, an *ex parte* Board finding that "the carriers had demonstrated a need for 'some additional revenue'" (See Moss I at page 894), does not render the last lawful rates unjust and unreasonable and thus deprive them of their status as a benchmark for measuring restitution.

Finally, the Court of Appeals has ordered restitution in two comparable cases. See *Williams v. Washington Metropolitan Transit Commission*, 134 U.S. App. D.C. 342, 415 F.2d 922 (1968) cert den 393 U.S. 1081, 21 L.Ed.2d 773 (1969), and *Democratic Central Committee of D.C. v. Washington Metropolitan Area Transit Commission*, 158 U.S. App. D.C. 107, 485 F.2d 886 (1973) cert den 415 U.S. 935, 39 L.Ed.2d 493 (1974). In *Williams*, the Court of Appeals ordered restitution of rates paid pursuant to invalid orders, because as it said on page 943 (F.2d):

> ". . . we could not permit Transit to retain the increased fares, since to do so would be to give legal effect to the Commission's invalid order."

In *Democratic Central Committee*, the Court of Appeals ordered restitution stating on page 824 (F.2d):

> "Rectification of the illegal consequences of an unlawful rate order must then consist in something other than retroactive rate-making . . . . The remedy, rather, is restitution."

What impelled the Court of Appeals to deny restitution in *Moss II* and to order it in *Williams* and *Democratic Central Committee* appears to turn on only two questions. One, may "unlawful" rates changed in a manner not sanctioned by law be treated as properly filed? Two, are those rates retroactively validated in a second proceeding, one essentially beyond the scope of the remand in *Moss I*, void *ab initio* within the context of this case notwithstanding their "currently effective" status [See 49 U.S.C. 1373(b)].

Petitioner submits that "unlawful" rates cannot be treated as properly filed. More important, they were void *ab initio* as being tainted with illegality due to Board-air carrier collusion. In *Atlantic Coast Line*, this Court treated the rate increases as void, even though the majority considered them voidable within the context of a purely pro-

cedural error of the Interstate Commerce Commission alone without any fault of the carrier. Here, we have a case where the air carriers cooperated with the Board, bartering away the rights of fare paying passengers behind closed doors. This gross misconduct is clearly not the type of "procedural error" this Court had in mind when it declared the rates "voidable" in *Atlantic Coast Line.*

REASONS FOR GRANTING THE WRIT

1. The decision below disrupts the traditional allocation of functions between the courts and the Civil Aeronautics Board, both in withholding from the courts their power to adjudicate private disputes under state law, and in the invocation of statutory powers to regulate air transportation, contrary to the Federal Aviation Act and to decisions of this Court.

By enacting the Federal Aviation Act, Congress granted the Board power only to protect the public interest or to vindicate that interest by exercising specific powers entrusted to it. See *Civil Aeronautics Board v. Delta Air Lines, Inc.* (1961) 367 U.S. 316, 6 L.Ed.2d 869, and *American Airlines v. North American Airlines* (1956) 351 U.S. 79, 100 L.Ed. 953. Congress did not grant any power to the Board to adjudicate the rights and liabilities of parties in private disputes. There can be no other meaning ascribed to Section 1106 of the Federal Aviation Act, which expressly provides that the Act ". . . shall (not) in any way abridge or alter the remedies now existing at common law or by statute. . . . ." See *Hewitt-Robins, Inc. v. Eastern Freight-ways, Inc.* (1962) 371 U.S. 84, 9 L.Ed.2d 142, distinguishing the question decided as a "far cry" from that present in *T.I.M.E. Inc. v. United States* (1959) 359 U.S. 464, 3 L.Ed. 2d 952. In *Hewitt-Robins,* this Court held that a private remedy for misrouting survived even though the rates were

reasonable and that the Interstate Commerce Commission had exercised its primary jurisdiction in making its "reasonableness" determination.

Allowance of a private remedy for restitution is not inconsistent with the recent decision of this Court in *Cort v. Ash* (1975) ..... U.S. ....., 45 L.Ed.2d 26. There, one of the relevant factors to be used in determining whether a private remedy is implicit in a statute not expressly providing one is:

> "Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?"

Thus, the courts, rather than the regulatory agency charged with protection of the public interest, are available for the resolution of private legal remedies against air carriers. The survival of such a private remedy depends on the effect of its exercise upon the statutory scheme of regulation. Where Congress has expressly preserved common law remedies in the saving clause of the Federal Aviation Act in Section 1106, allowance of a private remedy is consistent with the regulatory scheme.

The Court of Appeals has either ignored or sharply departed from these judicially recognized principles. Its holding that a private remedy is not available against the regulated carriers for collusive misconduct which produced "unlawful" tariffs, without first obtaining a retroactive validation of those tariffs, will deeply and seriously affect the historic relationships between federal agencies and courts throughout the nation. Indeed, a practice capable of repetition tends to encourage the type of appellate counsel's *post hoc* rationalizations for agency action condemned by this Court in *Burlington Truck Lines v. United States* (1962) 371 U.S. 156, 169, (L.Ed.2d 207, 216. This applies

not only to the federal courts, but to state and local courts as well.

The decision of the Court of Appeals effectively withdraws from judicial bodies at every level their traditional role in adjudicating private claims of any kind under both the common law and specific statutes. Moreover, it then assigns an important part of that job to a federal administrative agency. Yet the circuit court never mentioned and apparently did not even consider the effect its decision would have on these important functional divisions of responsibilities as between the state and federal courts and the federal regulatory agencies. As Judge Fahy correctly noted in his dissent (*Nader v. Allegheny Airlines, Inc.,* supra), the Board and the Court of Appeals have nullified a common law remedy expressly allowed by Congress in Section 1106.

2. The decision that the Board may retroactively immunize conduct of the air carriers which, in collusion with the Board and violative of the Federal Aviation Act, produced "unlawful" tariffs, is unprecedented and contrary to the statutory limitations on that agency's powers.

In *Hughes Tool Company v. Trans World Airlines* (1973) 409 U.S. 363, 34 L.Ed.2d 577, this Court held that a private antitrust suit for damages could not proceed where the Board had asserted jurisdiction over and actually approved the transactions involved. The Court of Appeals in this litigation has gone far beyond the holding in *Hughes Tool Co.,* however, in asserting that the Board not only has the power to approve collusive misconduct of the air carriers and thus insulate them from civil liability, but that it may do so *retroactively*—after the injury has already occurred. The Court of Appeals found that the proper standard for recovery was such as to preclude relief in *Moss II* ". . . at least at this stage of the proceedings." (Appendix A, infra, at page A.8). What the Court

meant by the quoted language is not explained, nor was it able to cite any helpful precedent.

The doctrine of retroactive agency immunization from the consequences of its own violation of the Federal Aviation Act, a violation in which the air carriers knowingly participated, is indeed unknown to the common law. Moreover, it seriously misconstrues the Board's powers and conflicts directly with the preservation of common law remedies explicitly provided for in Section 1106 of the Federal Aviation Act.

Certainly this is not a situation in which the award of restitution in a civil action would inherently conflict with the Board's exercise of its jurisdiction and powers. Exercise of a restitutional remedy against the air carriers is entirely consistent with the statutory scheme of regulation. See *Hewitt-Robins,* supra. In fact, exercise of the judicial remedy sought by petitioner here supports the overall purposes of the Act, one of which is the public interest in having tariffs determined upon the notice and public hearing mandated by Section 1002(d)—49 U.S.C. 1482(d). Whatever the courts might decide as to particular claims to restitution for past misconduct, the Board still remains free to exercise its statutory authority to regulate the industry in the future.

Here, the issue is simply whether petitioner, as representative of an ascertainable class, was the victim of collusive misconduct of the Board and the air carriers which required the payment of "unlawful" fares. This is a matter well within the competence of courts to decide in an action for restitution.

As a corollary to this issue, a second question is presented in this petition. Did the Board exceed the scope of its mandate from the Court of Appeals in *Moss I* by initiating Docket No. 23140, essentially a *second* proceeding

purportedly in the exercise of a primary jurisdiction already exercised. Upon remand, the Board treated the court's order as one which required it to re-establish new, lawful fares prospective in operation. The Board did so effective October 15, 1970. Thus, its duty upon remand was fulfilled, and there was nothing left for it to do. However, citing the public interest and the existence of various class actions, it initiated Docket No. 23140 on February 25, 1971 by Order No. 71-2-109 (C.A. App. commencing at page 44).

It was then and still is petitioner's contention that the Board acted in excess of its jurisdiction and beyond the scope of the order on remand in *Moss I*. See *Re Sanford Fork & Tool Co.* (1895) 160 U.S. 247, 40 L.Ed. 414, and *Zdanok v. Glidden Company, Durkee Famous Foods Division* (C.A. 2) 327 F.2d 944 (1964) cert den 377 U.S. 934.

CONCLUSION

A central purpose of the Federal Aviation Act is the regulation of the airline industry in a way which is not unduly oriented toward the industry it is designed to regulate, rather than the public interest it is designed to protect. Yet the decision of the Court of Appeals in *Moss II* turns the Act on its head by extending judicial sanction to a collusive rate-making procedure which violated specific provisions of the Act and produced "unlawful" tariffs. The Court's decision has also erected an enormous new barrier to common law recovery of all or any part of those "unlawful" tariffs. In fact, the Court of Appeals has effectively nullified any common law remedies, all of which were preserved by Congress when it enacted Section 1106 of the Act.

The Court's holding that the Board's regulatory jurisdiction may be invoked to extinguish retroactively a common law right of action is wholly unprecedented, and in plain conflict with Section 1106. It confers upon the Board

the power to define common law remedies in a manner not sanctioned by any grant of such power from Congress. This sweeping decision not only disrupts traditional relationships between state and federal courts and federal agencies and interferes with common law remedies, but it sanctifies illegal and collusive misconduct involving the Board and the air carriers, all at the expense of the public interest the Board was established to protect.

Petitioner submits that these factors present a substantial federal question not previously decided by this Court and one which demonstrates the need for review of the case by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 1975, three copies of Petition for Writ of Certiorari to the United States Court of Appeals, District of Columbia Circuit were mailed, postage prepaid, to Alan R. Demby, Esq., Thomas J. Heye, Esq., General Counsel, O. D. Ozment, Esq., Deputy General Counsel, and Glen M. Bendixsen, Esq., Associate General Counsel, Civil Aeronautics Board, Washington, D.C. 20428; Howard E. Shapiro, Esq., Department of Justice, Antitrust Division, Washington, D.C. 20530; and Richard Littel, Esq., General Counsel, and Robert L. Toomey, Esq., Civil Aeronautics Board, Washington, D.C. 20428, Counsel for the Respondent. I further certify that all parties required to be served have been served, including the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

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San Francisco, California 94111
Counsel for Petitioner

Supreme Court of the United States

No. ....., October Term, 1975

KEITH ROBERTS		CIVIL AERONAUTICS BOARD
	vs.	
Petitioner		*Respondent*

The Clerk will enter my appearance as Counsel for the Petitioner.

By WILLIAM M. BRINTON
WILLIAM M. BRINTON
1400 Alcoa Building
One Maritime Plaza
San Francisco, California 94111

NOTE: This appearance must be signed by an individual *Member of the Bar of the Supreme Court of the United States.*

The Clerk is requested to notify counsel of action of the Court by means of Airmail Letter.

NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a particular individual to whom notification is to be sent, with the understanding that if other counsel should be informed *he will perform that function.*

In this case the person to be notified for Petitioner is:

WILLIAM M. BRINTON
1400 Alcoa Building
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San Francisco, California 94111

(Appendices Follow)

APPENDIX

Appendix A

In the United States Court of Appeals
for the District of Columbia Circuit

John E. MOSS et al., Petitioners,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

Northwest Airlines Inc., American Airlines, Inc., Trans World Airlines Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., Delta Air Lines, Inc., Keith Roberts, Allegheny Airlines, Inc., and North Central Airlines, Inc., United Air Lines, Inc., Western Air Lines, Inc., Hughes Airwest et al., Braniff Airways, Inc., and National Airlines, Inc., Intervenors.

Keith ROBERTS, Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent,

American Airlines, Inc., Northwest Airlines, Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., Delta Air Lines, Inc., Allegheny Airlines, Inc., and North Central Airlines, Inc., United Air Lines, Inc., Hughes Airwest, Frontier, et al., Trans World Airlines, Inc., National Airlines, Inc., and Braniff Airways, Inc., Intervenors.

Nos. 73-1772, 73-1790.
United States Court of Appeals,
District of Columbia Circuit.
Oct. 16, 1975.

Before J. EDWARD LUMBARD,* Senior Circuit Judge for the Second Circuit, and McGOWAN and ROBINSON, Circuit Judges.

McGOWAN, Circuit Judge:

This case comes in the aftermath of *Moss v. CAB*, 139 U.S.App.D.C. 150, 430 F.2d 891 (1970), which invalidated certain airline passenger fares made effective by the Civil Aeronautics Board in violation of Section 1002 of the Federal Aviation Act. 49 U.S.C. § 1482 (1970). The question now is whether there is to be a recovery of any part of those unlawful fares. The Board has denied such relief on the grounds that the fares in question were not unjust or unreasonable, and, in any case, resulted in no unjust enrichment of the airlines. We conclude that these decisional principles are determinative, and that they were correctly applied. Accordingly, we affirm.[1]

I

The history of this case is quite involved, and may best be set out chronologically:

August 20, 1969. Petitioners Moss, et al., requested the Board to suspend a number of proposed fare increases

*Sitting by designation pursuant to Title 28, U.S.Code Section 294(d).

1. Two petitions for review of the same Board order have been consolidated. The first, No. 73-1772, was filed by Congressman John E. Moss and some twenty-four colleagues. It is they who instituted the Board proceedings culminating in the challenged order, as it was they (or a similar group) who secured the ruling of this court in *Moss I*. The second petition, No. 73-1790, was filed by Keith Roberts, a plaintiff in one of several district court suits filed after *Moss I*, in which relief was sought directly against the airlines. Those suits having been continued pending the outcome of the Board proceedings, petitioner Roberts successfully sought to intervene before the Board. In addition to filing his own review petition in this court, Roberts has also intervened in No. 73-1772. Some fourteen airlines have intervened in both appeals, urging that the Board be upheld.

claimed by the airlines to be necessary to offset sharp inflation in their costs and decline in their revenues. Petitioners called at the same time for a rulemaking proceeding in which the Board would undertake a general review of its ratemaking practices.

September 12, 1969. The Board issued Order 69-9-68, in which it suspended the proposed rates. Recognizing an urgent need for some additional revenue, however, the Board in the same order identified a formula by which the Airlines could compute rate increases that would not be suspended. Rate increases of approximately six percent, as contemplated by the formula, were filed and became effective as of October 1, 1969.

January 29, 1970. The Board instituted its Domestic Passenger Fare Investigation, a broad inquiry into various aspects of airline ratemaking. The *DPFI* was later divided into nine separate phases: (1) aircraft depreciation; (2) leased aircraft; (3) deferred federal income taxes; (4) joint fares; (5) discount fares; (6) seating configurations and load factors (subsequently made the subjects of separate phases 6A and 6B, respectively); (7) fare levels; (8) rate of return; and (9) fare structure.

June 19, 1970. The Board announced its intention to allow the airlines to "round up" their October 1, 1969 fares to the nearest dollar. The increase took effect July 1, 1970, and yielded some $50 million in additional airline revenues.

July 9, 1970. This court rendered its decision in *Moss I*, invalidating Order 69-9-68 and holding unlawful the fares computed and charged pursuant to it. It was held that the Board had "determined" rates within the meaning of Section 1002(d) and (e) of the Federal Aviation Act, 49 U.S.C. § 1482(d) and (e) (1970), without complying with the requirements of those sections that this be done after

notice and hearing, and by reference to statutory ratemaking criteria. The case was remanded to the Board for further proceedings consistent with the court's opinion.

July 28, 1970. The Board continued the rounded-up October 1, 1969, fares in effect, declaring that these were the only ones that could be lawfully charged pending establishment of new fares. Order 70-7-128. It called in the same order for carrier filings of new fares to be effective October 15, 1969, such fares to be "free of any compulsion that may have been inherent in the invalid Order 69-9-68."

July 29, 1970. The Board moved this court for a stay of its mandate in *Moss I* for ninety days to permit establishment of new fares in the manner described above. The stay was granted.

September 24, 1970. The Board suspended all new fares filed pursuant to its July 28 order, except those that re-established the rounded-up October 1, 1969, fares. These newly filed, though unchanged, fares were, in the Board's view, free of any compulsion from the order invalidated in *Moss I.*

October 7, 1970. Petitioners requested this court to stay its mandate in *Moss I* for a further period, and thus to express its disapproval of the manner in which the Board had re-established the rates. We were further requested to order the Board to rule promptly on petitioners' request for relief from the fares held unlawful in *Moss I.* Both requests were denied.

February 25, 1971. The Board initiated proceedings to determine whether the rates charged between October 1, 1969, and October 15, 1970, were "unjust and unreasonable." The Board noted the pendency of a number of class actions brought in district courts against the airlines for recovery of part of the fares ruled unlawful in *Moss I.* On February 19, 1971, these cases had been transferred by the

Judicial Panel for Multidistrict Litigation to the United States District Court for the Northern District of Illinois. *In re Air Fare Litigation,* 322 F.Supp. 1013 (Jud.Pan. Multi.Lit., 1971). Partly in order to aid the Northern District of Illinois to resolve these suits, the Board deferred decision of the question of whether it had power to grant relief, and proceeded directly to the question of the reasonableness of the challenged fares. The class action suits were in fact stayed pending the Board's resolution of that question, *Weidberg v. American Airlines,* 336 F.Supp. 407 (N.D. Ill., 1972), and the suits were subsequently dismissed on the basis of the Board order now under review. *Weidberg v. American Airlines,* No. 70 C 1879 (N.D.Ill., filed Dec. 10, 1973).

April 9, 1971. The Board issued its final decision in Phase 6B of the *DPFI* (load factors), and its tentative findings and conclusions in Phase 7 of the *DPFI* (fare levels). The latter proposed a fare level 12% higher then the unlawful October 1, 1969 rates. After taking interim adjustments into account, this higher level required an increase of 9% in the then prevailing rates. The Board authorized an increase of 6% pending its final decision in Phase 7. (The Board's final decision, affirming its tentative one, came on August 11, 1973.)

May 7, 1971. Fare increases of 6%, as provided for in the Board's April 9 orders, went into effect. The lawfulness of these rates has not been challenged by petitioners.

July 11, 1973. The Board issued Order 73—7—39, its final decision denying relief from the rates found by this court in *Moss I* to have been unlawfully "determined."

July 16, 1973. Petitioners sought direct review in this court of Order 73—7—39.

The foregoing is an account of three sets of interrelated proceedings before the Board, dealing with (1) the estab-

lishment of lawful fares in place of those found unlawful in *Moss I*, (2) the propriety of relief for the public from those unlawful rates, and (3) the general matter of how rates were properly to be set in the future. Since petitioners claim that lawful fares were not re-established until May 7, 1971, they seek relief from rates charged during the period running from that date back to October 1, 1969.[2] This attempt to establish the unreasonableness of rates charged during that period rests largely on the retroactive application of standards set in the *DPFI*.

During the period in which the October 1, 1969, rates were charged, the airlines did not in fact earn excessive profits from their passenger operations. The average rate of return on such operations for the year ending September 30, 1970, was found by the trial examiner to have been 3.29 percent in the case of the trunk line carriers, and —.40 percent in the case of the local carriers.[3] Petitioners do not challenge these findings. A fair and reasonable rate of return had been established by the Board in 1960 in its *General Passenger Fare Investigation* at 10.5 percent. This was increased in Phase 7 of the *DPFI*, concluded in 1971,

2. Br. Petitioners at 9. There is dispute among the parties as to when lawful passenger fares were re-established. The intervenors claim, for example, that since petitioners made no attack upon the board's action in allowing newly-filed but unchanged fares to go into effect on October 15, 1970, the latter date marks the end of the period for which relief could be sought, at least with the aid of *Moss I*. Br. Intervenors Braniff Airways, *et al.* at 10. Since we find that petitioners have not yet established their entitlement to relief for any period, we need not resolve this dispute.

3. Initial Decision of Trial Examiner Ross I Newmann at 23; App. 504. The figures were derived by use of the so-called "by-product" or "revenue-offset" method of allocating the costs of carrying passengers and belly cargo. By this method the cost of belly cargo is simply equated to the revenue it generates. The trial examiner further found that the more refined "joint product" method, by which the actual (and greater) costs of belly cargo are sought to be identified, yielded similar figures, 4.19 percent and —.13 percent respectively. Initial Decision at 23-24; App. 504-05.

to 12 percent for the trunk lines and 12.35 percent for the locals. Assuming, as the Board did, that a fair rate of return for the period in question lay somewhere between these two figures, plainly it was not achieved. The poor performance was nothing new. A return as high as 10 percent had been achieved by the trunk lines during only two of the ten years prior to 1970, the average for that decade being 6.2 percent. App. 522.

Petitioners argue, however, that the absence of excessive operating profits is not dispositive. They have instead made the following claims:

(1) The right to recover passenger fares is not dependent on their having been "unreasonable," but solely on their having exceeded the last preceding rates that were lawfully established (*i. e.*, the pre-October 1, 1969, rates).

(2) Even if recovery of unlawfully established rates is to be had only to the extent that they exceeded what was "reasonable," such an excess existed here because

(a) the rate of return for the period in question should be recomputed on the assumption that the airlines experienced the higher load factors which the Board determined in Phase 6A of the *DPFI* should be the standard for the future;

(b) the rate of return should be recomputed on the assumption that all seats had been sold for full fares, with a reduction or "dilution" on account of discount fares only to the extent of 12 percent, this figure being regarded by petitioners as reasonable in light of the Board's determination in Phase 5 of the *DPFI* that future fare levels would be constructed on the assumption that no discounts were offered at all;

(c) the airlines' "indirect" costs (those not directly associated with the operation of aircraft) should be limited to 48.4 percent of total costs, this standard

also being one that was allegedly adopted in the *DPFI*.

(3) Even if the general fare level did not yield profits which, as properly recomputed, were "unreasonable," recovery should be had by those who paid unjustly discriminatory rates during the period in question.

The Board gave varied responses to these claims.[4] The first claim—that for a refund of all amounts charged in excess of pre-October 1, 1969, rates—the Board dismissed on the basis of contrary court decisions. The second set of claims—those attempting to establish the unreasonableness of charged rates by the retroactive application of standards adopted in the *DPFI*—the Board turned aside in two ways. It found in some instances that the fares were not unreasonable even if tested by the appropriate rate making standards. In other instances, however, it declined to apply those standards retroactively because doing so would be "inequitable." The Board's response to the third claim—that based on fare structure—was cast even more clearly in terms of the equity of recovery rather than the propriety of the fares.

II

There are a number of vexing questions presented by this appeal. Is there any right of recovery for previously charged and properly filed airline fares?[5] If so, who may grant it; the Board, this court, a district court, or some

4. *See generally* CAB Order No. 73-7-39, July 11, 1973; App. 732.

5. *Compare* ***T.I.M.E., Inc. v. United States***, 359 U.S. 464, 79 S.Ct. 904, 3 L.Ed.2d 952 (1959) (absence of reparations power in ICC precludes recovery for unreasonable motor carrier rates), *with* ***Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.***, 371 U.S. 84, 83 S.Ct. 157, 9 L.Ed.2d 142) (shippers could recover for misrouting by motor carriers). These cases are discussed at greater length below.

combination?[6] And what is the standard of recovery, assuming it is the same in the various forms which may grant it? We need only address the last of these questions, for we find that the proper standard for recovery is such as to preclude relief to these petitioners in any forum—at least at this stage of the proceedings.

As there is scant precedent for the granting or denial of recovery of unlawful airline fares,[7] we begin with a brief review of the problem as it has arisen in analogous regulatory contexts.

(a) *Interstate Commerce Commission.*

Part I of the Interstate Commerce Act explicitly imposes upon subject rail carriers a liability, enforceable either before the ICC or in a district court, for violation of the Act's commands, among them that just, reasonable, and nondiscriminatory rates be charged.[8] The standard of recovery is, of course, justness and reasonableness, a matter

6. All four possibilities are presented in this appeal. The district judge before whom the class actions were consolidated, *see* slip page 130, ... U.S.App.D.C. ....., ... F.2d....., *supra*, apparently assumed that he could grant relief based on a Board finding that the fares in question were unreasonable. 336 F.Supp. 407 (N.D.Ill. 1972). The Board itself was of course requested to grant relief. Having failed in that forum, petitioners now urge that we as an appellate court exercise an inherent authority to order restitution ourselves, as ostensibly we did in *Williams v. Metropolitan Area Transit Comm'n*, 134 U.S.App.D.C. 342, 415 F.2d 922 (1968), *cert. denied*, 393 U.S. 1081, 89 S.Ct. 860, 21 L.Ed.2d 773 (1969).

7. The only precedent known to us is *Danna v. Air France*, 334 F.Supp. 52 (S.D.N.Y.1971), in which recovery was sought of allegedly discriminatory passenger fares. The district judge dismissed on the ground that *T.I.M.E., Inc. v. United States*, see note 5 *supra*, barred any recovery. The judgment was affirmed, but on the more limited ground that recovery must in any case await a determination by the Board that the fares in question were indeed unlawfully discriminatory. 463 F.2d 407 (2d Cir. 1972).

8. 49 U.S.C. §§ 1(5), 3(1), 8, 9 (1970). A similar regimen applies to water carriers subject to Part III of the Interstate Commerce Act. See 49 U.S.C. §§ 901 *et seq.*, 908 (1970).

within the Commission's primary jurisdiction.[9] There is no comparable right of recovery expressly given by the Federal Aviation Act for unlawful airline rates. Still, there is at least one railroad rate case that is highly relevant to our problem. In *Atlantic Coast Line R.R. v. Florida,* 295 U.S. 301, 55 S.Ct. 713, 79 L.Ed. 1451 (1935), recovery was sought of rate increases which the Commission had itself ordered into effect, assertedly to prevent a discrimination against interstate commerce. The Commission's order was judicially reversed for lack of adequate factual findings. The Commission subsequently issued new and more ample findings, reestablished exactly the same rates, and was this time upheld in the courts. In these circumstances, the Commission was thought to be "without power to give reparation" for the improperly established rates. 295 U.S. at 312, 55 S.Ct. 713. The ratepayers' only remedy was for restitution, which Justice Cardozo described as follows:

> A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. . . . The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.

Id. at 309, 55 S.Ct. at 716. In concluding that equity required no restitution—not even the partial restitution the

9. *Compare Texas & P. Ry. v. Abilene Cotton Oil Co.,* 204 U.S. 426, 448, 27 S.Ct. 350, 358, 51 L.Ed. 553 (1907) ("a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke the redress through the Interstate Commerce Commission"), *with J. C. Famechon Co. v. Northern P. R.R.,* 23 F.2d 307 (8th Cir. 1927) (primary resort to Commission not necessary where issue is legal construction of filed tariff).

lower court had granted—the Court relied primarily on the fact that following its earlier reversal the Commission had made new and procedurally adequate findings that the invalidated rates had in fact been just and reasonable.[10]

Interstate motor carriers are now subject to the same express statutory liability for unreasonable rates as are the railroads.[11] Prior to 1965, however, the Commission was, with respect to motor carriers, in the same position as the Board—lacking any express reparation or refund power. That lack was held by the Supreme Court in *T.I.M.E., Inc. v. United States,* 359 U.S. 464, 79 S.Ct. 904, 3 L.Ed.2d 952 (1959), to preclude recovery by the payers of unreasonable motor carrier rates, at least where the claim was made by way of a defense in an action by the carrier to collect rates which had been properly filed with, and not challenged before, the Commission Three years later, however, in *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.,* 371 U.S. 84, 83 S.Ct. 157, 9 L.Ed.2d 142 (1962), the Court held, over the objection of *T.I.M.E.*'s author

10. The existence of a judicial power to restore the fruits of a subsequently invalidated rate order gains further support from Section 74 of the ALI Restatement of the Law of Restitution (1937):

> JUDGMENTS SUBSEQUENTLY REVERSED. A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right to restitution of the excess.

The existence of such power in regulatory agencies themselves appears to have ben recognized by the *Supreme Court in United Gas Improvement Co. v. Callery Properties,* 382 U.S. 223, 229, 86 S.Ct. 360, 463, 15 L.Ed.2d 284 (1965), where it was stated that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order."

11. *See* Pub.L. No. 89-170, 79 Stat. 651 (1965), as *codified,* 49 U.S.C. § 304(a) (1970); *Land O'Lakes, Inc. v. United Buckingham Freight Lines, Inc.,* 351 F.Supp. 102 (D.Min.1972).

(Harlan, J.), that common law remedies against common carriers could survive the enactment of the statute so long as they were consistent with its regulatory scheme. Such a surviving remedy was that for misrouting of a shipper's goods, on which ground the plaintiff in *Hewitt-Robins* in fact prevailed.

(B) *Federal Power Commission.*

The only express reference to recovery of excessive rates in the Natural Gas and Federal Power Acts is in connection with the exercise by the FPC of its power to suspend rates for five months pending their investigation. *See* 15 U.S.C. § 717c(e), 16 U.S.C. § 824d(e) (1970). Suspended rates may go into effect after that period if the investigation is incomplete, but if they are later finally determined to be excessive, the Commission has power to order their refund. Recovery is for the excess of charged rates over what was just and reasonable, with the price specified in a seller's certificate of convenience and necessity serving as a "refund floor." *See FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 23-24, 88 S.Ct. 1526, 20 L.Ed.2d 388 (1968).[12] Refunds may also be ordered by way of the FPC's conditioning the certification of natural gas sales on the refunding of excessive rates that have previously been charged, either under a temporary, unconditioned certificate, *see, e. g., Continental Oil Co. v. FPC*, 378 F.2d 510, 530-32 (5th Cir. 1967), *cert. denied*, 391 U.S. 917-19, 88 S.Ct. 1801, 20 L.Ed.2d 655 (1968), or under a permanent, unconditioned certificate that has subsequently been invalidated in the courts. *See, e.g., United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 86 S.Ct. 360, 15

12. *See also, In re Hugoton-Anadarko Area Rate Case*, 466 F.2d 974, 990 (9th Cir. 1972) (refunds could be forgiven by the Commission if they would otherwie treat principal seller "unfairly as compared to the other producers").

L.Ed.2d 284 (1965). Such refunds would again be limited to the excess of actual over reasonable charges, and might be even less, since "the issue of a refund in [such] circumstances turns upon equitable considerations." *Public Service Commission of New York v. FPC*, 117 U.S.App.D.C. 287, 329 F.2d 242, 249-50, *cert. denied sub nom. Prado Oil & Gas Co. v. FPC*, 377 U.S. 963, 84 S.Ct. 1644, 12 L.Ed.2d 735 (1964).[13]

(C) *Metropolitan Area Transit Commission.*

A third area in which this court in particular has confronted the problem of public recovery of unlawful rates is in connection with the Washington Metropolitan Area Transit Commission, which for a time oversaw the operations of an independent D. C. Transit company under a multistate Compact between the District of Columbia, Maryland and Virginia.[14] The Compact required the Commission to establish, and Transit to charge, just and reasonable rates. There was no provision for recovery or refund of excessive rates.[15] Nonetheless, we held in *Bebchick v. Public Utilities Commission*, 115 U.S.App.D.C. 216, 318 F.2d 187, 203-04, *cert. denied*, 373 U.S. 913, 83 S.Ct. 1304, 10 L.Ed.2d

13. *See also Skelly Oil Co. v. FPC*, 401 F.2d 726, 729 (10th Cir. 1968) ("no inequity results" where FPC orders refund of rates charged in accord with permanent certificate which was later reconsidered, seller being "on notice that the allowed rate was subject to revision"); *Plaquemines Oil & Gas Co. v. FPC*, 146 U.S. App.D.C. 287, 450 F.2d 1334, 1337-38 (1971) (where uncertificated sales were later determined to have been within FPC jurisdiction, it had "equitable power 'to regard as being done that which should have been done' . . . and to order refunds to be paid if necessary to achieve that goal").

14. The company's operations were taken over by the Washington Metropolitan Area Transit Authority on January 14, 1973. *See* National Capital Area Transit Act of 1972, Pub.L. No. 92-517, 86 Stat. 999 (1972).

15. *See D.C.Code* § 1-1410 (1966).

414 (1963), that where the Commission had improperly authorized a fare increase, the amount realized could not be retained by the company, and even if it could not be directly refunded, had somehow to be "utilized for the benefit of the class who paid it." In *Williams v. Washington Metropolitan Area Transit Commission,* 134 U.S.App.D.C. 342, 415 F.2d 922 (1968), *cert. denied,* 393 U.S. 1081, 89 S.Ct. 860, 21 L.Ed.2d 773 (1969), we were more explicit about the nature and measurement of the public recovery in such a case. Such recovery was held to be "governed by the equitable considerations which apply to suits for restitution generally." We found that in the circumstances of that case these principles required Transit to "restore the amount realized by the fare increase only to the extent that its actual return is not reduced to an amount which all parties have agreed would be unreasonably low." *Id.* at 944-46. In *Democratic Central Committee of D. C. v. Washington Metropolitan Area Transit Commission,* 158 U.S. App.D.C. 107, 485 F.2d 886, 913-15 (1973), *cert. denied,* 415 U.S. 935, 94 S.Ct. 1451, 39 L.Ed.2d 493 (1974), we again invalidated a Commission-authorized rate increase. Once again we found "the appropriate avenue of relief . . . to be restitution," though in this instance we remanded the case to the Commission for its consideration of what exactly should be restored.

(D) *United States v. Morgan.*

We take note, finally, of *United States v. Morgan,* 307 U.S. 183, 191-98, 59 S.Ct. 795, 83 L.Ed. 1211 (1939), involving an order of the Secretary of Agriculture reducing stockyard rates to a just and reasonable level. The order was stayed pending judicial review, but the amount by which, if valid, it would reduce the stockyard owners' receipts was ordered paid into court. The Secretary's order was invalidated on

procedural grounds, and the Court faced the question of the fund's disposition. The district court was instructed to proceed "in conformity to equitable principles," and primarily on the basis of what the Secretary subsequently determined to have been the just and reasonable rates for the period.[16]

The foregoing brief survey suggests that if there is a remedy for properly filed airlines rates later found to be unlawful, it is of one of the following kinds: a surviving common law (or conceivably an implied statutory) remedy for unreasonable charges by a common carrier (analogous to that recognized in *Hewitt-Robins, supra*); a right to seek the exercise by the CAB of its power to condition certificates of convenience and necessity on the refunding of more-than-reasonable fares (analogous to that recognized in *Continental Oil* and *Callery, supra*); or a right to have the CAB or the courts order the restitution of amounts collected by virtue of erroneous orders or judgments (by analogy to *Atlantic Coast Line, Morgan,* and this court's *Transit Company* cases).

[1] One right which clearly does not exist is the one petitioners claim for recovery of all amounts in excess of the last lawfully established rates. To cite only the most prominent contrary authority, the Supreme Court in *Atlantic Coast Line* expressly rejected the suggestion that where a rate order was procedurally defective the carriers should restore the excess over the last lawfully established rate, and thus "pay the price of the blunders of the commerce board." 295 U.S. at 314, 55 S.Ct. at 718. Significantly, the

16. *See also Zuber v. Allen,* 396 U.S. 168, 197, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969) (where the Secretary of Agriculture had improperly ordered increase in certain milk prices, the proceeds of such increase having been held in escrow pending judicial review, court "struck an equitable balance" in restoring to purchasers only amounts paid in after District Court reversal of Secretary's order).

dissenters in that case would have granted just the recovery that petitioners now seek. *See id.* at 318-30, 55 S.Ct., 713.[17] Our holdings in *Williams v. Washington Metropolitan Area Transit Commission,* 134 U.S.App.D.C. 342, 415 F.2d 922 (1968), *cert. denied,* 393 U.S. 1081, 89 S.Ct. 860, 21 L.Ed.2d 773 (1969), and *Democratic Central Committee of D.C. v. Washington Metropolitan Area Transit Commission,* 158 U.S.App.D.C. 107, 485 F.2d 886 (1973), *cert. denied,* 415 U.S. 935, 94 S.Ct. 1451, 39 L.Ed.2d 493 (1974), both discussed *supra,* are also inconsistent with petitioners' claim.

[2, 3] We find no support for petitioners' "last lawful rate" theory in the two cases on which they primarily rely, *Middlewest Motor Freight Bureau v. United States,* 433 F.2d 212 (6th Cir. 1970), *cert. denied,* 402 U.S. 999, 91 S.Ct. 2169, 29 L.Ed.2d 165 (1971), and *Chicago, Milwaukee, St. P. & P. R.R. v. Alouette Peat Products,* 253 F.2d 449 (9th Cir. 1957). The former is a case in which the last lawfully established rate happened also to be the just and reasonable one. An ICC order cancelling a proposed rate increase had been stayed pending review. When the stay was later lifted, recovery was sought of the amounts which, because of the stay, were charged in violation of the ICC's by-then-vindicated cancellation order. The rate-payers prevailed, not because the lower rates were the last lawfully established rates, but because the Commission had correctly found that

17. Another express rejection of petitioners' theory appears in *Plaquemines Oil & Gas Co. v. FPC,* 146 U.S.App.D.C. 287, 450 F.2d 1334 (1971), *supra* note 13. At issue there was the FPC's power to order refunds for uncertificated sales that were only later determined to be within the Commission's jurisdiction. We endorsed the principle (applied by the Commission to some of the uncertificated sales) that since it lacked cost-of-service information for the period, it would consider rates that were "in line" with those prevailing in the region to be in compliance with the Act. We disapproved the principle (applied by the Commission to other uncertificated sales) that refunds were required simply because the charged rates were not on file with the Commission. *See id.* at 1336-39.

they were the highest rates that could justly and reasonably be charged. See 433 F.2d at 229-32. *Alouette* is distinguishable as a case in which the full amount of a rate increase was restored, even though at least part of that increase appeared just and reasonable, because the increased rates were not properly on file with the Commission.[18] We have not discussed the matter of "overcharges," or charges in excess of properly filed rates. Manifestly, the case for a strict rule of recovery is far stronger in that context.[19]

18. Railroad rate increases are normally to be effective only on thirty days' notice. The Commission made an exception to this rule, and allowed five days' notice for increases of certain rates of six cents or twenty percent, whichever was less. The carrier put into effect, on five day' notice, a twenty percent increase, which happened to be more than six cents. The new rates were held not to be lawfully on file with the Commission, and the full amount of the increase was ordered restored.

19. We may also pass quickly over petitioner Roberts' claim that the Board was without power to inquire into the justness and reasonableness of past rates. It is true that the Board cannot make rates retrospectively, *see, e.g., Williams v. Metropolitan Area Transit Commission,* 134 U.S.App.D.C. 342, 415 F.2d 922, 940 (1968), but this is not the same thing as inquiring into the propriety of relief and into any issue on which relief turns. *See Atlantic Coast Line R.R. v. Florida,* 295 U.S. 301, 312, 55 S.Ct. 713, 718, 79 L.Ed. 1451 (1935) (Interstate Commerce Commission was without reparations power but "not without power to inquire whether injustice had been done and to report accordingly.") Even assuming that the Board could not itself order recovery, we have seen that the propriety of recovery may turn on the reasonableness of rates. The Board's primary jurisdiction over that question strongly argues for its power to furnish a retrospective answer to it, even if it is doing so merely as a prelude to action by the courts. In fact the power to do so seems amply embraced within the Board's powers to "conduct such investigations . . . as it shall deem necessary to carry out the provisions of . . . this chapter," 49 U.S.C. § 1324(a) (1970), and, upon "complaint in writing with respect to anything done . . . in contravention of . . . this chapter, . . . to investigate the matters complained of." *Id.* § 1482(a). The Supreme Court in *United States v. Morgan,* 307 U.S. 183, 198, 59 S.Ct. 795, 803, 83 L.Ed. 1211 (1939), held that the very similar statutory powers of the Secretary of Agriculture enabled him to investigate the reasonableness of past rates where his doing so would "afford an appropriate basis for action in the district court in making distribution of the [escrow] fund in its custody."

[4, 5] We have concluded that the Board correctly focused on the equity of restitution and not just the reasonableness of past rates. Reasonable rates, in this regulated industry as in others, are those which are as low as possible but still allow the industry to provide "adequate and efficient service" and earn a reasonable rate of return, thus assuring its ability to attract necessary capital in the future. The just and reasonable rate, in short, is the rate at which, under a given set of economic circumstances, the industry will perform efficiently as that term is defined by the statute.

[6] There are distinct equitable considerations which may prevent a recovery even where fares had been found to exceed what was just and reasonable. It might be thought, to take the facts of our case as an example, that the reasonable rate for a past period was one which paid for a far more modest service than was actually provided, but that since a lavish service was in fact provided, with apparent Board blessings, there is no equity in extracting profits which never existed. Other circumstances can be imagined which might have already denied the airlines the fruits of their unreasonable prices, and thus make it inequitable to require them to be disgorged. The excessiveness of prices, perhaps in combination with an unexpected economic downturn, might itself have caused a ruinous decline in the volume of air travel, with consequent losses to the airlines. Even if excessive profits were made in a given period, there may be inequity in trying to recover them, particularly if large classes of people are involved. As to who receives relief, it may be impossible to reimburse those who actually paid the unreasonable rates, so that the best that can be done is to establish a fund on the carrier's books to be applied for the benefit of future fare-payers.[20] As to who provides relief, past stockholders may have reaped the benefits of the unreasonable fares and departed the scene, leaving future stockholders to be adversely affected by the recovery. The bite which is effectively taken from future earnings by a recovery fund may in turn impair the health of the industry, to the disadvantage of the fare-payers themselves.

The facts of our case are illustrative. The excessive profits sought to be recovered were not in fact earned but must be hypothesized by a recomputation of costs and revenues. A substantial fare-payer recovery on this theory would in practical effect mean that an airline industry which had performed badly in the past (from the investors' point of view) would be all the more likely to perform badly in the future. The equitable aspects of refunding past rates are as inextricably entwined with the Board's normal regulatory responsibility, as such refunds may substantially affect the future rates, performance, and health of the industry. The statutory scheme thus seems to require that the Board pass in the first instance not only on the reasonableness of past rates, but on the equity of any recovery where such rates are found to have been unreasonable. *Cf. Democratic Central Committee of D.C. v. Washington Metropolitan Area Transit Commission,* 158 U.S.App.D.C. 107, 485 F.2d 886 (1973), *cert. denied,* 415 U.S. 935, 94 S.Ct. 1451, 39 L.Ed.2d 493 (1974).

III

The Board's approach to its task of determining whether the airlines had been unjustly enriched was to look first

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20. This is the form of recovery ordered in *Bebchick v. Public Utilities Comm'n,* 115 U.S.App.D.C. 216, 318 F.2d 187, *cert. denied,* 373 U.S. 913, 83 S.Ct. 1304, 10 L.Ed.2d 414 (1963), and also the form which petitioners proposed in this case.

at their actual rate of return during the period in question, calling this "the best overall index of the reasonableness . . . of passenger fares," App. 501, and upon finding it inadequate, as it undisputedly was, to assess petitioners' specific arguments as to why and how that rate of return should be readjusted. We turn now to those arguments.

(A) *Load Factors.*

A load factor is simply an expression of how full airplanes are. It is the ratio of the number of miles flown during a given period by revenue-paying passengers, to the number that could have been flown had every available seat been filled. Before 1971, it had been the Board's practice to accept for ratemaking purposes the load factors that the airlines actually experienced, *i.e.*, to determine revenue needs and the fares necessary to meet them on the assumption that the flights an airline proposed to offer would be only as full as past experience suggested. In 1971, however, the Board came to the conclusion in Phase 6B of its *DPFI* that this policy had fostered overcapacity in the industry. Barred from price competition, the airlines vied for the available traffic by scheduling more and more flights, which were more and more empty and required higher and higher fares to pay for them. The higher prices depressed the volume of air travel, further aggravating the overcapacity problem. To break the cycle the Board proposed standard load factors which would in the future be assumed when calculating the revenues that a proposed flight would generate. Actual load factors would of course vary, but by making rates with reference to the assumed factors the Board would insure that *earnings*, rather than *fares*, would fluctuate with load factors. The airlines would thus have a strong incentive to reduce overcapacity. *See generally* Order 71—4—54; App. 182.

The last point is critical. The Board disavowed any intent in adopting the load factor standards to force the airlines into particular scheduling molds. Its purpose was to force an adjustment by the airlines to its new load factor constraints, but exactly what the adjustment would be, the airlines themselves were to decide. *Id.* at 190. The policy was thus entirely prospective in nature, as is borne out by the Board's adoption, for the trunklines, of an interim standard substantially lower than that to which it would hold the airlines in the long run.

The long run factors adopted by the Board were 55 percent for the trunklines, 44.4 percent for the local lines, and 54.1 percent for the industry as a whole; the interim trunkline factor was 52.5 percent.[21] During the period in which the challenged rates were charged, the trunk airlines actually experienced a load factor of only 48.9 percent, and the locals one of 43.2 percent.[22] Petitioners would recalculate the airlines' earnings on the basis of the 54.1 percent figure.[23]

[7] The Board's answer was, first, to entertain for the trunklines only the interim factor as a possible basis for

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21. *Id.* at 228. The interim trunkline standard was adopted in Phase 7 of the *DPFI*, in which the Board considered the question of what changes in the fare level were dictated by the load factor and other newly adopted rate making standards. *See* Order No. 71-4-59; App. 283.

22. Exhibit BE-19; App. 38.

23. Actually, petitioners offered a recalculation of the trunklines' rate of return only, omitting the local carriers' rate of return and contenting themselves with a statement in their brief that their computations must understate the excess profits for the industry as a whole, the locals being unaccounted for. Br. Petitioners at 52. There is of course no necessary logic in this position. Indeed, the locals maintain that even the full retroactive application of petitioners' proposed load factor, dilution, and indirect cost standards leaves them far short of an adequate return. The claim appears to be uncontested either before the Board or this court, and therefore gives further support to the Board's result.

retroactively computing reasonable rates. Petitioners' contention, that the higher, permanent factor must be applied to the earlier period, appears to rest on the assumption that that figure represents an ideal load factor—then and now. They overlook the fact that one of the circumstances of which a regulatory agency may take account is past regulation. The Board's own past policies of restricting price competition and allowing service competition to flourish may be partly to blame for overcapacity in the industry. However, the airlines came to their present pass, it was the Board's obligation to bring them through it with a minimum of disruption. In short, what is just and reasonable encompasses not only what is ideal, but what approaches it in an orderly and reasonable fashion. Hence the interim standard. Under the circumstances the Board might well have abused its discretion had it ignored that standard in favor of the permanent one.

The Board expressed doubt as to the reasonableness—or at least the equitableness—of applying even the 52.5 percent figure retroactively. It also found, however, that a 52.5 percent load factor produced a rate of return of only 6.13 percent for the trunklines, while a 44.4 percent factor produced a .65 percent return for the local carriers.[24] Neither earned unreasonable rates of return, therefore, even if the appropriate load factors were applied retroactively. We have seen no plausible attack on this calculation, or on the inadequacy of the rate of return which it yields. We uphold the Board in its conclusion that thus far no unreasonableness had been established.[25]

24. See Exhibits BE-21, 22, 25, 26; App. 39-42.

25. In fact the Board found that even if the long term industry-wide factor of 55 percent were applied retroactively, it would produce a rate of return of only 8.83 percent for the trunklines. Board Decision at 17 n. 39; App. 749. Petitioners have not attacked any of these calculations, but rest their hopes on the retroactive application, in addition to the load factors, of dilution and indirect cost standards. The latter arguments are discussed, and rejected, below.

(B) *Dilution.*

The term refers to the loss of revenues, expressed as a percentage, from selling seats at less than full fares. There are any number of ways in which such sales are made—youth fares, military fares, family fares, excursion fares, standbys, and so on. Such discount fares work an obvious discrimination against full fare passengers and are therefore facially inconsistent with "rule of equality" contained in § 404(b) of the Federal Aviation Act, 49 U.S.C. § 1374(b) (1970). They have nonetheless been tolerated by the Board on the theory that they could benefit the full fare passenger, first, by stimulating new and increased demand, and thus paving the way for long run economies of scale (*e.g.*, larger, more economical aircraft); and, second, by filling seats that would otherwise be empty, and thus allowing the full fare passenger to subsidize those seats partly rather than fully.[26]

On such reasoning the Board in 1965 approved the use of military standby and youth standby and reservation fares.[27] On review the Fifth Circuit remanded the matter of the youth fares for further consideration, *see Transcontinental Bus Systems, Inc. v. CAB*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920, 88 S.Ct. 850, 19 L.Ed.2d 979 (1968). Such consideration ultimately took the form of Phase 5 of the *DPFI*, in which a number of discount fares were re-evaluated. Some of these the courts had ordered the Board to reconsider (*e.g.*, family fares, *see Trailways of New England, Inc. v. CAB*, 412 F.2d 926 (1st Cir. 1969)),

26. *See* Order No. 72-12-18 at 11-12; App. 543-44.

27. Order F-22186, Docket 15845 *et al.* (May 20, 1965); Order F-23138, Docket 16826 (Jan. 20, 1966).

and some it had not, but all had apparently had the Board's previous approval. *See* Order No. 70-12-18; App. 537-39.

The Board in Phase 5 concluded that in general the bases on which the discriminatory discount fares had been justified were not sound. Little additional traffic had been generated, and the potential cost savings to be realized from traffic increases were found to be slight in any event. More important, the fares were not filling seats that would otherwise be empty; instead, new capacity was being added to accommodate the discount passengers. In essence the Board recognized that it was facing another aspect of the same problem that concerned it in *DPFI* Phase 6B dealing with load factors: If the airlines, barred from price competition, tended to compete by increasing their capacity, and if this tendency was made chronic by their ability to pass the cost of overcapacity along to the fare-payers, it did not help to allow the airlines to discriminate among those fare-payers; indeed, it only made matters worse for those discriminated against. Put another way, a limitation on dilution is a necessary complement of the load factor standards, for the burden of overcapacity on the full fare passenger is not substantially lessened if, while requiring that only 45 percent of an average flight's seats be *empty,* the Board allows another 20 percent (let us say) to be *half empty* in the sense of being filled by passengers who do not pay full fares.

The Board therefore resolved in Phase 5 to tolerate only certain kinds of discounts which were shown to have the potential of enhancing an airline's short run profits, *i.e.,* for filling flights that were already scheduled to fly and would otherwise fly empty. To insure that the discounts would not remain in effect, and become a burden on the full-fare passenger in the way we have described, the Board limited the duration of the discounts to eighteen months, and also

announced a powerful disincentive to their use, namely, it would in future fare proceedings assume zero dilution. It would assume, in other words, that all seats were sold for full fares.[28]

It is on this basis that petitioners insist that the airlines' revenues for the period in question be recomputed to allow a dilution of only 12 percent of what full fare receipts would have been. The 12 percent figure was proposed by their sole expert witness, who testified that discount traffic accounting for smaller amounts of dilution tended to be carried by existing capacity, but that when such traffic took a larger bite from revenues, it tended to be accommodated by capacity increases.

The Board responded in several ways. It stated that there was no evidence to support the 12 percent figure (as indeed there appears to be none[29]), and that a percentage standard was in any case "faulty in concept" (as appears to be true, the effect of a discount upon capacity being much more a matter of its timing than the amount of traffic it generates).[30] We may assume, without deciding, that these attacks on petitioners' proposed dilution standard would be inadequate without some consideration by the Board of

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28. *See generally* Order No. 72-12-18; App. 529.

29. Petitioners' expert witness himself admitted that "we have arbitrarily, if I may use that word in a mathematical sense as it was used this morning, drawn that line temporarily at 12 percent." Tr. 641; App. 641. The only justification given for it was that certain evidence adduced in Phase 9 of the *DPFI* tended to show that dilution traffic was accommodated by added capacity only in the long haul markets, and only in these markets did dilution exceed 12 percent. *See* Tr. 651-54; App. 74-77.

30. Thus, a sharp discount offered on short notice for flights already scheduled could generate a large amount of additional traffic but no additional capacity, while a less attractive discount planned longer in advance could cause the airline to schedule additional flights to accommodate the expected traffic increase, even though it was very slight.

whether some *other* standard would be more acceptable. In the event, the Board went on to reject the retroactive application of any dilution standard. It stated that the dilution policy of Phase 5

> was intended to provide the carriers with an "incentive to make sound pricing decisions which will take into account both the long-term and short-term factors." Manifestly, this policy was designed to provide incentives for the future, and was not intended to be applied retroactively.

Board Decision at 25; App. 757.

While this appears to represent a conclusion by the Board that the computation of just and reasonable rates for the period in question need not incorporate a limit on the use of discount fares, that conclusion was clearly alloyed with a concern over the inequity of a retroactive dilution adjustment. The sentences quoted above were followed in the Board opinion by its statement that "[f]or the reasons previously given, such a retroactive application would be highly arbitrary *and inequitable*." *Id.* (emphasis supplied). The "reasons previously given" included the fact that, up to and including the period in question, the various discounts were approved by the Board.

[8] The Board's conclusion that retroactive adjustment for dilution would be "arbitrary and inequitable" seems to us persuasive, particularly when viewed in the broader context of airline ratemaking. The laws of supply and demand operate in the airline industry as elsewhere. Different fare structures and schedules will generate different amounts of traffic, and different rates of return. The number of solutions to the supply-demand equation is infinite. The Board's approach has not been to choose a particular solution, but to impose constraints on the solutions

the airlines may choose (*i.e.*, that those solutions must entail a reasonable rate of return, 55 percent full airplanes, no discrimination, etc.). The benefits of innovation and competition are thus to some extent preserved by allowing the airlines to devise their own solutions, and then to outperform those solutions by operating more efficiently (and more profitably) than had been assumed.

In this context it does indeed seem "faulty in concept" to impose a particular ratemaking constraint upon a prior period during which, of course, the private initiative which it was intended to elicit never occurred. And it is certainly inequitable by such retroactivity to deprive the carriers of the chance to make a profit from operations conducted within that constraint. The inequity is greater when inadequate profits were made by the carriers even under the constraints then-applicable. Petitioners are in the position of claiming that profits which never existed should be disgorged because they would have existed had the proper regulatory guidelines been in force, when in fact there is no way to know whether such profits would have been earned or not. The Board's rejection of this position as "arbitrary and inequitable" seems to us completely sound.

(C) *Indirect Costs and Costs Generally.*

Petitioners also claim that during the period in question the airlines experienced excessive indirect costs, or costs not related to the actual operation of aircraft. The claim has undergone something of an evolution. Before the Commission it was argued that ratemaking standards adopted in the *DPFI* required that indirect costs for the period be limited to 48.4 percent of direct costs. The Commission pointed out in response that the 48.4 percent figure had been employed in Phase 7 of the *DPFI* (that concerned with fare levels) solely for the purpose of forecasting indirect

costs. In the Commission's words, "[i]t is not a Board standard, nor does it have any relevance to the past period." Board Decision at 19; App. 751. The Board also observed that the indirect costs actually experienced during the period in question amounted to only 47.7 percent of direct costs, so that the airlines did not exceed the limit of 48.4 percent, even assuming it was properly regarded as such.

[9, 10] In their brief to this court petitioners appear to accept the Board's disposition of their argument based on the 48.4 percent figure. They now claim that it was not enough for the Board merely to turn that particular argument aside, but that an independent assessment of the reasonableness of carrier costs, direct and indirect, was required. *Democratic Central Committee of D.C. v. Washington Metropolitan Area Transit Commission,* 158 U.S. App.D.C. 107, 485 F.2d 886 (1973), *cert. denied,* 415 U.S. 935, 94 S.Ct. 1451, 39 L.Ed.2d 493 (1974), is cited for support, and particularly our holding in that case that

> The Compact placed an obligation upon the Commission to develop the record on important matters when it was unsatisfied with the record produced by the parties. The Commission, like other agencies charged with the protection of the public interest, was not created simply to "provide a forum for the" proceeding.

Id. at 905.[31]

31. A related claim is that petitioners were erroneously assigned the burden of proof as to the reasonableness of the unlawfully established fares. This appears not to be the case. The Board began its investigation by observing that "the carrier parties . . . propose to show the fares accord with all of the substantive standards of the Act just as in any other rate proceeding involving a past period," Order 71-2-109, App. 484; and it concluded its investigation with the statement that "[t]he carriers have abundantly satisfied the evidentiary burden cast on them in this proceeding as to the reasonableness of the fares." Board Decision at 28; App. 760. Nor can we find fault with the merits of the latter conclusion. The airlines established, with the aid of some thirty witnesses and 3500 pages of written exhibits, that their earnings during the period in question were woefully inadequate, even when analyzed according to the appropriate guidelines developed in the *DPFI*. As stated in text, that was enough to establish the reasonableness of the fares.

We find no error in the Board's methodology. *Democratic Central Committee* involved a different statute, a different regulatory agency, and a different regulated industry. As we explained at some length, the transit company was a monopoly, the purpose of regulation was to afford the consumer the benefits of competition, and one of these was efficiency, which non-competitive firms tend not to achieve.

The airlines, by contrast, are in many respects highly competitive. Indeed it is partly to hold destructive competition in check that the CAB exists; price competition, for example, is effectively prevented. Other kinds of competition flourish, however. It is on this assumption that the Board accepts industry cost averages for rate making purposes. It is assumed that the carriers will compete to reduce costs below those averages and so make a larger profit.[32] To be sure, the load factor and dilution standards adopted in the *DPFI* represent efforts by the Board to control costs which competition has failed to control, but the failure derives more from an excess of competition than a dearth of it. The duties of the Board with respect to investigating carrier costs may thus be quite different from those discussed in *Democratic Central Committee*. They may well be discharged by the Board's simply inquiring into whether the applicable industry-wide cost guidelines of the *DPFI* have been exceeded.

That is what the Board did in this case. It agreed with petitioners that "the reported operating results of the carriers under the fares in question should not be accepted

32. *See, e.g.,* Order No. 72-8-50 (DPFI Phase 7; Fare Level) at 46; App. 527.

[but] must be adjusted to conform to [*DPFI*] standards." It concluded, however, that "the data supplied for this period conform to the Board's conclusions in the *DPFI* with respect to Treatment of Flight Equipment Depreciation and Residual Values for Rate Purposes, . . . Treatment of Leased Aircraft for Rate Purposes, . . . and Treatment of Deferred Federal Income Taxes for Rate Purposes." Board Decision at 13-14; App. 745-46. The remaining *DPFI* standards for load factor and dilution were given more extensive consideration, owing to stress placed on them by petitioners. The Board's cursory discussion of *DPFI* guidelines on which petitioners placed no emphasis seems to us acceptable under the circumstances. Whereas in *Democratic Central Committee* we were reviewing a prospective rate making decision of the Commission, we are here reviewing the Board's conclusions as to whether there has been unjust enrichment.[33] At least where this is the question, and where the background to it is a period of low actual profitability for the airlines, the Board need not have given more than summary consideration to arguments the petitioners had not specifically advanced.

(D) *Discrimination.*

The claim for recovery on the ground that the fare structure was discriminatory is allied to that based on dilution, but discrimination in favor of the discount passenger is, however, only one of the unjust discriminations alleged to have taken place. Others include discrimination between (1) short and long haul travellers (the latter being allegedly the victims of mileage formulae which did not take account of the higher per mile cost of short flights), (2) travellers using congested and those using non-congested airports (again because mileage formulae did not reflect actual costs), and (3) travellers paying a single or through fare and those who must pay multiple fares (a fixed terminal charge being included in each of the latter).

33. This question, significantly, we remanded to the Commission in *Democratic Central Committee.*

As the Board noted, however, these characteristics of the fare structure had been in lawfully filed and effective tariffs for many years without Board interference. Indeed, the immediate tariffs in question, filed in response to what the Board indicated it would accept, effectively initiated a significant lessening of the discrimination of which petitioners now complain.[34] Thus the fare structure in effect during the period in question was directly responsive to what the Board considered and represented to be lawful. And the carrier, as a practical matter, had no choice but to file the tariffs they did.

[11] Where, as here, recovery can only be had in terms of restitution grounded in equitable considerations, the circumstances just described are not such as to mandate recovery; and we leave undisturbed the Board's action in this regard. This conclusion is fortified by, although not dependent upon, the finding that the carriers did not receive excessive and unreasonable returns from the fare level involved here, and that there is no fund of net enrichment from which restitution could appropriately be made. Assuming *arguendo* that restitution in respect of discriminatory fares may conceivably be appropriate where a carrier knows or should have known that such fares

34. The formula unlawfully promulgated by the Board in Order No. 69-9-68 decreased the discounts available to youth standby, youth reservation, and family fare passenger. The same Order advised the carriers that their formula-developed fares, which were to expire in January of 1970, would be renewed only if progress had been made, as assertedly it was, in the publication of additional joint fares and in making long and short haul fares more reflective of actual costs. Board Decision at 30-32; App. 762-64.

existed in an otherwise just and reasonable fare level, the facts here do not admit of the attribution to the carrier of the requisite guilty knowledge. The fares in question were charged by the carriers in reasonable reliance on the Board's explicit approval of them. To the extent that the Board was mistaken about the lawfulness of the filing, the consequences of that mistake should not be visited upon the carriers, certainly absent any actual unjust enrichment.

The order appealed from is affirmed in all respects.

It is so ordered.

Appendix B

United States Court of Appeals
for the District of Columbia Circuit

No. 73-1772 September Term, 1975
United States Court of Appeals
for the Ninth Circuit
Filed Nov 20 1975
Hugh E. Kline
Clerk

John E. Moss, et al.,

Petitioners

v.

Civil Aeronautics Board,

Respondent

Northwest Airlines, Inc., American Airlines, Inc., Trans World Airlines, Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., Delta Air Lines, Inc., Keith Roberts, Allegheny Airlines, Inc., North Central Airlines, Inc., United Air Lines, Inc., Western Air Lines, Inc., Hughes Airwest, et al., Braniff Airways, Inc., National Airlines, Inc., Intervenors

No. 73-1790
Keith Roberts,

Petitioner

v.

Civil Aeronautics Board,

Respondent

American Airlines, Inc., Northwest Airlines, Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., Delta Air Lines, Inc., Allegheny Airlines, Inc., and North Central Airlines, Inc., United Air Lines, Inc., Hughes Airwest, Frontier, et al., Trans World Airlines, Inc., National Airlines, Inc., Braniff Airways, Inc., Intervenors

Before: Lumbard•, Senior Circuit Judge for the Second Circuit; McGowan and Robinson, Circuit Judges.

•Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

ORDER

On consideration of the petition for rehearing filed by Keith Roberts, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam
For the Court:

Hugh E. Kline
Clerk

United States Court of Appeals
for the District of Columbia Circuit

No. 73-1772 September Term, 1975

United States Court of Appeals
for the Ninth Circuit
Filed Nov 20 1975
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No. 73-1790
Keith Roberts,

Petitioner

v.

Civil Aeronautics Board,

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American Airlines, Inc., Northwest Airlines, Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., Delta Air Lines, Inc., Allegheny Airlines, Inc., and North Central Airlines, Inc., United Air Lines, Inc., Hughes Airwest, Frontier, et al., Trans World Airlines, Inc., National Airlines, Inc., Braniff Airways, Inc., Intervenors

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

ORDER

The suggestion for hearing *en banc* filed by Keith Roberts having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court *en banc* that the aforesaid suggestion for hearing *en banc* is denied.

Per Curiam
For the Court:

Hugh E. Kline
Clerk

Appendix C

§ 1324. General powers and duties of the Board— Performance of acts; conduct of investigations; orders, rules, regulations, and procedure

(a) The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this chapter, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this chapter.

49 § 1373

Observance of tariffs; granting of rebates

(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein. Nothing in this chapter shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees (including retired directors, officers, and employees who are receiving retirement benefits from any air carrier or

foreign air carrier), the parents and immediate families of such officers and employees, and the immediate families of such directors; widows, widowers, and minor children of employees who have died as a direct result of personal injury sustained while in the performance of duty in the service of such air carrier or foreign air carrier; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; immediate families, including parents, of persons injured or killed in aircraft accidents where the object is to transport such persons in connection with such accident; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulations prescribe. Any air carrier or foreign air carrier, under such terms and conditions as the Board may prescribe, may grant reduced-rate transportation to ministers of religion on a space available basis.

§ 1482. Complaints to and investigations by the Administrator and the Board—Filing of complaints; complaints against members of the Armed Forces

(a) Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this chapter, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint,

it shall be the duty of the Administrator or the Board to investigate the matters complained of. Whenever the Administrator or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing. In the case of complaints against a member of the Armed Forces of the United States acting in the performance of his official duties, the Administrator or the Board, as the case may be, shall refer the complaint to the Secretary of the department concerned for action. The Secretary shall, within ninety days after receiving such a complaint, inform the Administrator or the Board of his disposition of the complaint, including a report as to any corrective or disciplinary actions taken.

§ 1506. Remedies not exclusive

Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. Pub. L. 85-726, Title XI, § 1106, Aug. 23, 1958, 72 Stat. 798.

Appendix D

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 74-1108, 74-1146 and 74-1246

KEITH ROBERTS, et al.,
Plaintiffs-Appellants,
v.
AMERICAN AIRLINES, INC., et al.,
Defendants-Appellees.

MICHAEL WILLIAMS, et al.,
Plaintiffs-Appellants,
v.
AMERICAN AIRLINES, INC., et al.,
Defendants-Appellees.

ALAN WEIDBERG, et al.,
Plaintiffs-Appellants,
v.
AMERICAN AIRLINES, INC., et al.,
Defendants-Appellees.

AIR TRAVELERS ASSOCIATION, et al.,
Plaintiffs-Appellants,
v.
AIR WEST, INC., et al.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 71 C 783, 71 C 711, 70 C 1879, 71 C 785
HUBERT L. WILL, *Judge.*

ARGUED SEPTEMBER 8, 1975—DECIDED DECEMBER 8, 1975

Before CASTLE, *Senior Circuit Judge,* SWYGERT and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* These four appeals, consolidated in this court for hearing and disposition, are brought by some of the plaintiffs following an adverse judgment in the district court.

In August, 1969, twenty of the principal domestic air carriers filed tariffs which increased domestic air passenger fares. On September 12, 1969, the Civil Aeronautics Board (CAB) suspended these tariffs under 49 U.S.C. § 1482(g) (1964), but announced that it would accept, without suspension, tariffs which utilized a proposed fare formula. The carriers then withdrew their suspended tariffs and filed new tariffs in accordance with the Board's proposed fare formula. The carrier-filed tariffs were allowed to stand without suspension or investigation.

Thirty-two interested Congressmen then petitioned for review alleging that the CAB, by excluding the public from *ex parte* meetings with representatives of the air carriers and by holding a *pro forma* public hearing, had unlawfully approved the increased fare structure. In *Moss v. CAB,* 430 F.2d 891 (D.C. Cir. 1970), *(Moss I),* the Court of Appeals held that the September 12 order was invalid and the tariffs filed by the carriers based thereon were unlawful. Subsequently, a number of class actions were filed on behalf of all or a portion of the passengers on domestic airlines who paid the increased fares, seeking recovery of an amount measured by the alleged illegal increase. The Judicial Panel on Multidistrict Litigation ordered that all of the class actions be transferred to the United States District Court for the Northern District of Illinois for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407. *In re Air Fare Litigation,* 322 F.Supp. 1013

(J.P.M.L. 1971). Following transfer, the defendants moved to stay the proceedings pending completion of a CAB investigation entitled "Reasonableness of Passenger Fares charged by Domestic Trunkline and Local Service Carriers from October 1, 1969, through October 12, 1970." In *Weidberg v. American Airlines, Inc.*, 336 F.Supp. 407 (N.D. Ill. 1972), the court granted the stay motion and ordered that all proceedings in the litigation be held in abeyance until further order. On June 1, 1972, this court denied a petition for mandamus seeking to upset the stay order.

No further action, except routine status reports, took place in the suits for approximately eighteen months following this court's denial of the mandamus petition. Meanwhile, the CAB completed its investigation of the reasonableness of passenger fares and, on July 11, 1973, issued Order No. 73-7-39. This order denied to air passengers recovery of any part of the unlawful fares on the grounds that the fares in question were not unjust or unreasonable, and, in any case, resulted in no unjust enrichment of the airlines. After the publication of the CAB order, the district court indicated, during the regular status reports, that he was disposed to grant the defendant's motion to dismiss. At a subsequent status call, the district court judge expressed his view that the seven damage actions were moot. The district court judge observed that absolutely nothing was happening in the case and had not for a year, and he suggested that he would dismiss the cases, subject to reinstatement should the District of Columbia Court of Appeals reverse the CAB finding of just and reasonable rates.

On December 20, 1973, the district court, on its own motion, dismissed the seven actions with prejudice and without costs on the ground that the causes were moot. Four of the civil actions which were appealed are encompassed in these consolidated appeals;[1] the named plaintiffs in the other three actions did not seek appellate review. The appellants seek to reverse the judgment of dismissal.

The procedural history of these cases is inextricably related to other administrative and judicial proceedings. On July 16, 1973, Congressman John E. Moss and some twenty-four colleagues petitioned for direct review of CAB Order No. 73-7-39. It was they who had instituted the CAB proceedings which culminated in that order, just as it was they (or a similar group) who secured the *Moss I* ruling that invalidated the September 12, 1969, order. Keith Roberts, a named plaintiff in one of the district court suits and appellant in No. 74-1108, also filed a petition (No. 73-1790) seeking review of the 1973 order. He had successfully sought to intervene before the CAB in the procedings which produced the Board's final decision in Order No. 73-7-39, and he was also allowed to intervene in the Moss review petition (No. 73-1772).

At the time of oral argument of the present appeals, there had been no decision in the related review petitions. Subsequent to oral argument, the D.C. Circuit in *Moss v. CAB*, 521 F.2d 298 (D.C. Cir. 1975), *(Moss II)*, affirmed the challenged order. That court faced the question as to whether there was to be a recovery of any part of the unlawful fares, and it concluded that the decisional principles used by the CAB in denying such relief were determinative and correctly applied. Not only did the court expressly hold that the petitioners (Moss and Roberts) had no right to recover all amounts in excess of the last lawfully

1. No separate docket number has been assigned in the appeal *Air Travelers Association, et al. v. Air West, Inc., et al.*, which was docketed below as C-785. The February 12, 1974, notice of appeal filed in *Alan Weidberg, et al. v. American Airlines, Inc., et al.*, Appeal No. 74-1246, clearly stated that *Air Travelers Association, et al.*, was appealing from the January 14, 1974, final judgment in these actions.

established rates, but it also confronted, and rejected, the alternative claim that recovery of an amount measured by the difference between the charged fares and "reasonable" fares was available to the Moss petitioners or to Roberts.

The question originally raised in these consolidated appeals was whether passengers are entitled to recover damages or secure restitution of monies paid under illegal air passenger tariffs which the Civil Aeronautics Board has found not to be unjust or unreasonable. As originally argued, our primary task was to explicate the precise legal meaning of the *Moss I* holding that the September 12, 1969, CAB order was invalid and that the passenger tariffs were illegal. 430 F.2d at 902. The opposing parties found different meanings in the opinion, and they directed argument to the question whether the 1969 order was void or voidable. We think that *Moss II* clearly and correctly explicates the earlier decision and establishes that the CAB order attacked in *Moss I* was voidable rather than void.

Accordingly, we need not undertake a lengthy analysis of the substantive questions of law raised in these appeals. However, *Moss II* does not effectively resolve all of the vexing questions raised here, and we deem it necessary to address ourselves to some of the remaining problems.

I. Res Judicata and Mootness

A. Res Judicata

At the January 14, 1974, hearing on the motion to reconsider the orders of dismissal, the district judge focused directly on the impact on the present cases of an affirmance of CAB Order No. 73-7-39:

> THE COURT: • • •
>
> "My logic is, in fact, the dismissal stands because the District Court of Appeals, District of Columbia affirms that the fares were reasonable and fair, that

> that is res judicata, and it takes care of the issue once and for all, or, at least it is estoppel by judgment if not res judicata. There may be some technical differences between the parties.
>
> • • •
>
> "However, there is no damage because if these improperly adopted fares are subsequently determined to be fair and reasonable, then I don't know what there is left to litigate, except to give it to some law school moot court, or put it on an examination; but, there is nothing more useless than litigating issues from which there can be no recovery in the nature of damages or other relief.
>
> "So, the fact that the FAA [sic] has now found these fares to be reasonable, and that is now on appeal, seems to me means that these cases will all be moot. They are moot *at this point* unless that determination is reversed." (Emphasis added.)

Accordingly, the district court dismissed the cases as moot, with the proviso that it would reinstate the causes should the challenged CAB order later be reversed.

The above quotation from the transcript puts flesh on the bare bones of the formal minute order. The latter statement embodies only a one-sentence formulation, grounding the dismissal on "mootness." Our own reading of the record convinces us that the district court concluded that all of the plaintiffs' claims for restitution were barred by the CAB determination that the air passengers were not injured by paying the fares in question. The lower court relied on the fundamental legal premise that mere illegality which causes no injury is not ordinarily compensable. Thus, the district judge disposed of the cases upon the basis that the CAB finding that the challenged fares were not unjust and unreasonable necessarily implied that the plaintiffs

had not been injured and the defendants had not been unjustly enriched.

At the time of the dismissal order, of course, the challenged CAB order was the subject of review proceedings. As we have previously noted, appellant Keith Roberts was a party to the review petitions. Similarly, some fourteen airlines, the defendants-appellees in Appeal No. 74-1108, were allowed to intervene in the review process. Since there is identity of parties and issues, the principles of res judicata and collateral estoppel bar the restitution claims of Roberts.

Under 28 U.S.C. § 2106, this court may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review. Accordingly, we modify the dismissal order entered in Appeal No. 74-1108 so as to represent a Rule 56(b) summary judgment in favor of the defendants on all counts in the *Roberts* complaint, on the ground that *Moss II* establishes, as a matter of law, that Roberts has no right to recover from the air carriers. As so modified, the judgment is affirmed.

The other plaintiffs-appellants stand in a somewhat different technical position. The record indicates, and the *Moss II* opinion confirms, that they were not parties to the CAB proceedings which led to Order No. 73-7-39 and that they did not successfully intervene in the review petitions adjudicated in the *Moss II* decision. Accordingly, there is no strict res judicata effect of that decision regarding the claims of Weidberg, Williams, and the Air Travelers Association.

B. Mootness

In most litigation, the continuing existence of a dispute is not questioned, and the court can readily find that there exists a subject matter on which the court's judgment can

operate to make a substantive determination on the merits. See Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373 (1974). Courts have traditionally declined to hear cases in which neither party stands to gain or lose by a decision on the *theory* that the state should not be burdened with the expense of trying such controversies. *Id.* at 374. The doctrine that courts will not hear moot cases prevents the useless expenditure of judicial resources. *Id.* at 375-76. Indeed, it has been stated that "[i]n the cases where issues have become moot as a result of judicial decision, or otherwise, the courts unquestionably have the authority, and it often becomes their duty, to dismiss cases *sua sponte* and without any motion to dismiss being made." *Myers v. Polk Miller Products Corp.*, 201 F.2d 373, 376 (C.C.P.A. 1953).

The transcript of the January 14, 1974, hearing, part of which is set forth above, establishes that the district judge used the word "moot" to mean that the plaintiffs had suffered no injury by paying the fares in question and could not recover any monetary damages. The ambiguous usage of the term resulted in appellate briefs setting forth numerous cases exploring this subtle jurisprudential concept. We need not determine whether the district judge was correct in determining that the causes were moot as of the date of his dismissal order, for the case law establishes an independent and adequate ground for affirmance.

In *Schy v. Susquehanna Corp.*, 419 F.2d 1112 (7th Cir. 1970), *cert. denied*, 400 U.S. 826, this court had before it a judgment dismissing the complaint with prejudice on the merits where problems of motion practice raised important procedural issues. The *Schy* decision held that a motion to dismiss based upon a lack of damages may properly be treated as a motion to dismiss under rule 12(b)(6).

Id. at 1115. The court quoted approvingly from *Premier Malt Products Co. v. Kasser,* 23 F.2d 98, 99 (EdD.Pa. 1927), where the court observed:

> "There must be both the injuria and the damnum to give a legal cause of action, and this remains true notwithstanding the legal fiction of nominal damages. Indeed, this truth made the legal fiction logically necessary."

Accord, *Citrin v. Greater New York Industries,* 79 F. Supp. 692, 694-95 (S.D.N.Y. 1948); *Package Closure Corporation v. Sealright Co.,* 4 F.R.D. 114, 116 (S.D.N.Y. 1943). Moreover, *Schy, supra,* recognized that a motion to dismiss made after the filing of an answer not only served the same function as a motion for judgment on the pleadings and might be regarded as one, *id.* at 1115, but could be treated as a motion for summary judgment under Rule 12 (c). *Id.* at 1116.

In this case, the defendant air carriers moved for dismissal on the grounds that plaintiffs had failed to state a claim for which relief could be granted. Moreover, shortly after entry of CAB Order No. 73-7-39, the defendants filed a motion for summary judgment dismissing the consolidated actions on the ground that the CAB decision precluded recovery by the plaintiffs. The air carriers insisted that there was no genuine issue as to any material fact and that they were entitled to the requested summary judgment of dismissal as a matter of law.[2] The plaintiffs

2. The defendants-appellees relied on the same decisional principles found determinative by the CAB and, later, by the *Moss II* court. We have made an independent analysis of the precedents, and we agree with the *Moss II* decision. The allegations in the various complaints filed by the plaintiffs-appellants differ somewhat in language, but the general thrust of the language aims at a common law declaration for money had and received. We accept as conclusive the CAB finding, now affirmed by the *Moss II* court, that the air carriers were not unjustly enriched by collecting the fares in question. Under these circumstances, *Atlantic Coast Line R.R. v. Florida,* 295 U.S. 301 (1935), and *United States v. Morgan,* 307 U.S. 183 (1939), preclude a restitutionary remedy. If *Schy* and its analysis were not proper authority for treating the dismissal order as a grant of summary judgment for the defendants-appellees, we could properly conclude that the Williams, Weidberg, and Air Travelers Association claims were effectively mooted at least as of the date October 16, 1975.

responded to this motion by arguing that the pending appeal in Docket No. 73-1772 (the Moss review petition) made the summary judgment request premature, by adopting all their filed legal memoranda as an answering memorandum, and by citing additional legal authority in opposition to the motion. The plaintiffs placed great reliance on the pendency of the appeal, and they argued that no findings or conclusions in Order No. 73-7-39 could possibly be considered final.[3] Significantly, however, they made no direct argument that there was a genuine issue as to any material fact.

We think that, in substance if not in form, the district court granted the defendants' motion for summary judgment. Under the authority of *Schy,* we treat the challenged dismissal order as a Rule 56(b) summary judgment on all counts in the complaint in favor of the defendants. As so modified, the judgment is affirmed.

3. While this opinion was in the final stages of preparation, counsel for the appellants brought to our attention that Roberts had filed a petition for rehearing in the D.C. Circuit in *Moss II* with the suggestion that the matter be reheard en banc. From some points of view, of course, the litigation may not be final until either there has been a denial of certiorari or consideration and decision by the Supreme Court following the granting of a petition for certiorari. For that reason we find it necessary to state that a preliminary draft of an opinion had been prepared in the present appeals prior to *Moss II* which reached the same result as did the opinion in that case and for substantially the same reasons. No purpose was seen in preparing the final draft of this opinion for repeating what Judge McGowan stated so effectively in *Moss II.*

II. Non-Consideration of the Class Action Question

Another major problem still remaining in this appeal stems from the failure of the district court to consider or determine whether the suits should be maintained as a class action. Although inadequate compliance with F.R.Civ.P. 23(c)(1) has emerged in a number of recent appeals taken to this court, see, *e.g.*, *Peritz v. Liberty Loan Corp.*, 523 F.2d 349 (7th Cir. 1975); *Jimenez v. Weinberger*, ... F.2d ....., No. 75-1046 (7th Cir. September 12, 1975), neither side in the present case has briefed or argued the legal effect of the district court's failure to make the class determination in the instant cases.

This court has recently determined that, in an appeal from a decision on the merits made without the prior class determination required by Rule 23(c)(1), the reviewing court will treat the case as one brought by the named plaintiff only and not as a class action. *Case & Co., Inc. v. Board of Trade of City of Chicago*, 523 F.2d 355, 360, (7th Cir. 1975). Accordingly, we treat these cases as brought solely on behalf of the named plaintiffs.

Under established principles, the Rule 56(b) summary judgment against the named plaintiffs will not protect the defendant air carriers against other members of the class under the doctrine of res judicata, see *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 758-759 (3d Cir. 1974), *cert. denied*, 419 U.S. 885. However, the defendants, by moving for summary judgment prior to the class determination and the sending out of class notice, assumed the risk that a judgment in their favor would not protect them from subsequent suits by other potential class members. See *Haas v. Pittsburgh National Bank*, 381 F.Supp. 801, 806 (W.D.Pa. 1974), *rev'd on other grounds*, ... F.2d ....., No. 74-2190 (3d Cir. September 25, 1975). Since the defendants sought summary judgment on the ground that the

named plaintiffs could not recover monetary damages, they have the not inconsequential protection of stare decisis regarding identical claims of unnamed plaintiffs. See *Katz, supra* at 759; see also *Haas, supra* at 806. Although the air carriers have never expressly stated that they would be content to rest on the protection of stare decisis rather than upon res judicata, we think that the circumstances of this case authorize the court to infer such a concession.

Moreover, our recent decisions leave room for no other approach. In *Peritz*, the district judge severed a central liability issue from the class action determination issue and deferred resolution of the latter until after a jury determined whether the defendant's loan form clearly and conspicuously disclosed that credit life and/or disability insurance was not required for obtaining a loan from Liberty Loan Corporation. After the return of a special verdict establishing liability, the judge determined that a class action could be maintained on the claims remaining in issue. This court ruled that the language of Rule 23(c) clearly *requires* class certification prior to a determination on the merits. (emphasis in original). The court was constrained to hold that certification of the class was delayed beyond the permissible period allowed by the rule.

In *Jiminez*, the trial court certified the case as a class action after a decision on the merits. The real problem lurking in the case was the possibility of one-way intervention whereby a potential plaintiff could await a resolution of the merits before deciding whether or not to join the suit. This court in the recent *Jiminez* opinion indicated that, in some cases, the final certification need not be made *until* the moment the merits are decided. (emphasis in original). Since the class allegations in that case met the requirements of subdivision (b)(2) of Rule 23 rather than subdivision (b)(3), the court thought it fair to infer

that the timing of certification in the former kind of class suit could differ from the timing required in the latter. Because the allegations met (b)(2) requirements, the court was able to avoid concluding that non-certification required automatic reversal. Significantly, however, *Jiminez* plainly stated that a reversal would almost certainly have been required in the class action had it been maintained under subdivision (b)(3).

In the instant appeals, the class allegations fell under subdivision (b)(3). Moreover, at least one of the named plaintiffs formally moved for certification of the suit as a class action. We conclude that under the mandatory language of Rule 23(c)(1) and our prior decisions, the district court could not, should we remand the present actions for entry of Rule 56(b) summary judgments, proceed to make a delayed class certification. Thus, there is no way under the federal rules of procedure for the defendant air carriers to secure the protection of res judicata. They must rest content with the stare decisis protection. We cannot countenance a patent violation of Rule 23.

We have examined the other contentions raised by appellants, and we find them meritless. Accordingly, we modify the orders of dismissal, and, treating them as summary judgment that the named, individual plaintiffs are barred from securing restitution from the defendant air carriers, we affirm.

AFFIRMED AS MODIFIED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit